

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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THE OHIO ADJUTANT GENERAL'S)
DEPARTMENT, ET AL.,)
Petitioners,)
v.) No. 21-1454
FEDERAL LABOR RELATIONS AUTHORITY,)
ET AL.,)
Respondents.)
- - - - -

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Place: Washington, D.C.
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11
12 Washington, D.C.
13 Monday, January 9, 2023
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 11:13 a.m.
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8 behalf of the Union Respondent.
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BENJAMIN M. FLOWERS, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	NICOLE F. REAVES, ESQ.	
7	On behalf of the Federal Respondent	55
8	ORAL ARGUMENT OF:	
9	ANDRES M. GRAJALES, ESQ.	
10	On behalf of the Union Respondent	90
11	REBUTTAL ARGUMENT OF:	
12	BENJAMIN M. FLOWERS, ESQ.	
13	On behalf of the Petitioners	102
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 21-1454, the Ohio
5 Adjutant General's Department versus the
6 Federal Labor Relations Authority.

7 Mr. Flowers.

8 ORAL ARGUMENT OF BENJAMIN M. FLOWERS
9 ON BEHALF OF THE PETITIONERS

10 MR. FLOWERS: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The Sixth Circuit and the Federal
13 Labor Relations Authority held that Adjutants
14 General and state guards, when they employ
15 technicians, are federal agencies to which the
16 Authority may issue orders.

17 That is wrong. The Reform Act defines
18 agencies to include executive departments,
19 government corporations, and independent
20 establishments. Adjutants General and state
21 guards are none of these things. They're
22 neither among nor part of the 15 cabinet-level
23 agencies that qualify as executive departments.
24 They're not government corporations because
25 they're not corporations. And they're not

1 independent establishments because they're not
2 part of the executive branch.

3 The Authority concedes all of that,
4 but it claims it can regulate Adjutants General
5 and state guards anyway because they represent
6 or act on behalf of the Defense Department,
7 which is a Reform Act agency, when they employ
8 technicians.

9 But the Reform Act says that the
10 Authority can issue orders to agencies. It
11 gives it no power to issue orders to
12 non-agencies simply because they serve as the
13 representatives or agents or designees of an
14 agency.

15 Indeed, a serious sign of the problem
16 with the Authority's position is that even now,
17 40 years after the Reform Act was enacted, no
18 one can quite give a consensus justification
19 for the Authority -- for the power the
20 Authority wields. The Authority's arguments
21 have continued to evolve while the union and
22 amici advance novel arguments of their own.

23 If Congress had really given the
24 Authority this power, if it had really wanted a
25 federal independent agency with jurisdiction

1 over federal labor relations to issue orders to
2 state guards, it would not have made the grant
3 of that power so hard to find.

4 Ultimately, here, there's no reason to
5 resist the statute's plain meaning.

6 Dual-status technicians are employees of the
7 Defense Department, and they should enforce
8 their labor rights through and against that
9 department.

10 I welcome your questions.

11 JUSTICE THOMAS: Mr. Flowers, who
12 hires these technicians?

13 MR. FLOWERS: They are hired by the
14 Adjutant General. They become employees of the
15 Defense Department under 32 U.S.C. 709.

16 JUSTICE THOMAS: And so under what
17 authority does the Adjutant General hire the
18 technicians?

19 MR. FLOWERS: Federal law empowers us
20 to hire technicians that are then --

21 JUSTICE THOMAS: So it's done through
22 delegation?

23 MR. FLOWERS: Yes.

24 JUSTICE THOMAS: So they are federal
25 employees?

1 MR. FLOWERS: They are federal
2 employees. And let me explain why, because of
3 that, it makes the most practical sense to
4 route these disputes through the Defense
5 Department. So --

6 JUSTICE THOMAS: But isn't the
7 complaint the -- you have the -- the style of
8 the -- at least in the petition, it says before
9 the Federal Labor Relations Authority, U.S.
10 Department of Defense, Ohio National Guard is
11 -- is the style.

12 MR. FLOWERS: That is how the case was
13 captioned, but it was at least treated as a
14 suit against the state guard, not as against
15 the Department of Defense.

16 JUSTICE THOMAS: But I thought the
17 Adjutant General was an -- was an intervenor
18 respondent.

19 MR. FLOWERS: The Adjutant General
20 intervened to defend the interests of the state
21 National Guard, which was the initial party.

22 JUSTICE THOMAS: So this would make --
23 your argument would make much more sense if we
24 were talking about the state highway patrol.
25 Could you explain exactly when a technician is

1 a federal employee and for what purposes and
2 when a technician is a state employee?

3 MR. FLOWERS: So they are always a
4 federal employee under 32 U.S.C. 709(e). And
5 we're not disputing that they have collective
6 bargaining rights or that we are using these
7 federal employees. The question here is
8 whether we are ourselves a federal agency
9 because they can issue an order to us only if
10 we are, in fact, an agency. That's what the
11 statute says.

12 And we are not a federal agency, even
13 if we are an agent or a designee of the federal
14 government, because being someone's agent does
15 not turn you into the principal. It just means
16 you're acting on behalf of the principal.

17 I do want to, if I can, briefly
18 address --

19 JUSTICE KAGAN: Could -- could I just
20 --

21 MR. FLOWERS: Sure.

22 JUSTICE KAGAN: -- a point of
23 clarification? You -- you just said something
24 that also appears in your briefs that I was
25 confused by.

1 MR. FLOWERS: Sure.

2 JUSTICE KAGAN: You -- you said that
3 you're not disputing that these employees have
4 collective bargaining rights. What does that
5 mean to you? Because the idea of collective
6 bargaining rights is that there's somebody else
7 on the other side that has to sit down and
8 collectively bargain with you.

9 So are -- are you saying that, in
10 fact, there is an obligation on the -- on -- on
11 the part of the state guard to sit down at a
12 collective bargaining table?

13 MR. FLOWERS: It should be their
14 employer, which is the Department of Defense,
15 who could ask us to serve as the
16 representative, might be bound by what we enter
17 into, but it would be forced through and
18 against them.

19 Let me explain how that makes sense.
20 If you step back and you ask who's best
21 positioned to handle all this, the Authority in
22 the first instance or the Department, the
23 Department on the front end is the only entity
24 that can bring all the interests to the table.
25 So, when they're negotiating or trying to

1 amicably work out a dispute, they, unlike the
2 Authority, are subject to presidential control,
3 and so they can ensure that the President's
4 commander-in-chief powers aren't frustrated.
5 They have immense influence over the guards and
6 the Adjutants General.

7 But most important of all, the
8 technicians are Defense Department employees.
9 The Defense Department signs their checks. The
10 Defense Department withholds their dues. The
11 Defense Department issues myriad regulations
12 that govern the sort of conduct technicians can
13 engage in. That's all stuff with respect to
14 which they may wish to collectively bargain but
15 the Defense Department's in charge of.

16 JUSTICE KAVANAUGH: But the --

17 MR. FLOWERS: On the back end -- I'm
18 sorry. When -- yeah.

19 JUSTICE KAVANAUGH: Keep going. I'm
20 sorry.

21 MR. FLOWERS: I was going to say, on
22 the back end, when the Authority actually
23 issues the order, generally speaking, it's not
24 possible to -- or I should say, in some cases,
25 it won't be possible to redress their injuries

1 without the Department's cooperation. In this
2 very case, we were ordered to restore the union
3 to dues withholding status.

4 JUSTICE KAVANAUGH: I think you said
5 that the Department should be involved rather
6 than the -- but hasn't Congress, in essence,
7 resolved this by saying that the Secretary
8 shall designate the Adjutant General referred
9 to to employ and administer the technicians?
10 In other words, that's Congress speaking to
11 resolve the issue and say they're the ones who
12 are going to act on behalf of the Department.
13 We are federal -- they're federal employees,
14 you acknowledge, in a federal agency, you
15 acknowledge, and --

16 MR. FLOWERS: The Defense Department
17 is, yes.

18 JUSTICE KAVANAUGH: -- and the
19 Department of Air Force --

20 JUSTICE KAGAN: Which has collective
21 bargaining rights --

22 MR. FLOWERS: Sure.

23 JUSTICE KAGAN: -- you acknowledge?

24 JUSTICE KAVANAUGH: And they have
25 collective bargaining rights. And you said DoD

1 should be handling this, but Congress has
2 spoken to this and said DoD handles this
3 through this process, which is set out in
4 statute and which, by the way, has been used
5 since 19 -- from 1971 to 2016 uninterrupted
6 without any -- any objection, I guess, by -- by
7 Ohio.

8 MR. FLOWERS: So let me take that in a
9 few steps. The Defense Department has
10 certainly said that we employ them, though
11 they're also employed by the Department of
12 Defense at the same time. If the idea is that
13 we're acting on behalf of the Defense
14 Department, that would mean that we
15 collectively bargain on behalf of the Defense
16 Department, and the Defense Department should
17 be standing here rather than the Ohio Adjutant
18 General, that that's who their dispute should
19 be against. And, again, on the back --

20 JUSTICE JACKSON: But you hire and
21 fire and supervise them. I mean, I guess what
22 -- what concerns me a little bit is the
23 suggestion that, you know, while there might be
24 practical reasons why the statute could have
25 DoD be the operable agent here, it's not up to

1 us, right? We're not just in the first
2 instance making policy determinations about how
3 this thing should be structured.

4 And as Justice Kavanaugh just pointed
5 out, we have a statute that gives these people,
6 the dual-service technicians, collective
7 bargaining rights that in the collective
8 bargaining world, as Justice Kagan points out,
9 it means the right to sit across the table from
10 the people who hire and fire you and bargain
11 over the terms and conditions of your
12 employment.

13 So I guess your task in my view is to
14 establish why it is that Congress would have
15 intended to carve you out in this situation.

16 MR. FLOWERS: So let me first back up
17 for a second and explain -- it's important to
18 emphasize the law we're interpreting here, the
19 Reform Act, is not about National Guards and
20 technicians. It's a generally applicable law
21 for the federal government. And the word --

22 JUSTICE JACKSON: Well, the law we're
23 interpreting is the FL -- or FSLMRS, right?

24 MR. FLOWERS: That's the Reform Act.

25 JUSTICE JACKSON: Okay.

1 MR. FLOWERS: They're the same thing.

2 JUSTICE JACKSON: All right. Sorry.

3 MR. FLOWERS: Those statutes are
4 generally applicable. They apply to the whole
5 federal government. And the word in question
6 is "agency." So the federal -- the -- the --
7 the Authority has jurisdiction over us only if
8 we are an agency. And if -- to be an --

9 JUSTICE JACKSON: But DoD is an
10 agency, correct?

11 MR. FLOWERS: DoD is an agency --

12 JUSTICE JACKSON: All right.

13 MR. FLOWERS: -- so it can issue
14 orders for the Department of Defense.

15 JUSTICE JACKSON: And DoD, per the
16 statute that Justice Kavanaugh points out, has
17 delegated to your entities the authority to
18 hire, fire, and act in that capacity over this
19 group of people who have federal collective
20 bargaining rights, correct?

21 MR. FLOWERS: Congress has given us
22 that power, though the Defense Department, we
23 shouldn't minimize, has immense control over
24 that.

25 JUSTICE JACKSON: Understood. But why

1 isn't that answering the question?

2 JUSTICE KAGAN: It's not even a DoD
3 choice. I mean, it's a -- it's an obligation
4 on DoD to authorize you to be the supervisor of
5 these employees. This is not a choice on DoD's
6 part. DoD had to give this authority to you.

7 MR. FLOWERS: That's certainly true,
8 but it doesn't mean that we are the Department
9 of Defense. It means we're acting on their
10 behalf. So the Department of Defense may well
11 be bound by the contracts we enter into. We
12 don't take issue with that.

13 The Authority can issue orders to --
14 to the Department of Defense and, in fact, it
15 needs to for some of these things to bear out.

16 In the --

17 JUSTICE BARRETT: So this is a
18 technicality then, kind of, you know, to
19 Justice Kagan's point. You're just saying, you
20 know, they sued the wrong person, it should be
21 DoD here, and you -- you concede that DoD could
22 order you to go to the collective bargaining
23 table or order you to comply with an order
24 issued by the Authority?

25 MR. FLOWERS: I don't think they could

1 order us to. They could wield their influence
2 over us to strongly --

3 JUSTICE BARRETT: Why can't they order
4 you to if -- if you're their agent or
5 representative?

6 MR. FLOWERS: So -- so they could take
7 away the technicians, they could reduce our
8 funding, but they couldn't, for example,
9 replace the Adjutant General. They couldn't
10 strip -- they couldn't create a new state
11 National Guard. Those --

12 JUSTICE BARRETT: So you're not really
13 their agent or representative in the way that
14 we might otherwise understand principal agency
15 relationships?

16 MR. FLOWERS: It's not set up by a
17 contract with those sorts of relationships.
18 The Department of Defense is also an agency
19 with limited power granted by Congress, and
20 they have to act using the power they have,
21 which is influence rather than control.

22 And the reason that matters if we're
23 getting, why is it not a technicality, first,
24 the federal government would be handling these
25 things rather than us and they're better

1 positioned to do so. So I -- I don't know if I
2 mentioned this, but the -- for --

3 JUSTICE SOTOMAYOR: Oh, I'm sorry,
4 you're saying you want to change the law so
5 that you don't collectively bargain, DoD
6 collectively bargains?

7 MR. FLOWERS: Well, DoD may be able to
8 through regulation say, if you want the
9 technicians, you have to collectively bargain
10 with them for us. But what they can't do is
11 change the meaning of "agency" for the Reform
12 Act, the generally applicable statute, to make
13 a state entity into a federal agency.

14 JUSTICE SOTOMAYOR: So what do we do
15 with the savings clause? The savings clause
16 says that they don't want to save anything that
17 happened under the executive orders -- it says
18 you can't change -- we're not changing any
19 policies, regulations, or practices or
20 decisions that were issued under those
21 executive orders. And one of those decisions
22 very explicitly was the Thompson Field decision
23 involving the Minnesota -- Mississippi National
24 Guard.

25 And there the Court said -- not the

1 Court -- the -- the agency said very clearly it
2 rejected these very same arguments you're
3 making and said you can go into the
4 administrative process with the National Guard
5 and they're bound by those decisions.

6 MR. FLOWERS: So two answers.

7 JUSTICE SOTOMAYOR: So how do -- how
8 doesn't the savings clause just defeat all your
9 arguments?

10 MR. FLOWERS: Because it doesn't do
11 the work they would like it to do. What it
12 says -- what that statute did and what courts
13 have recognized for decades is it kept the
14 slate from being wiped clean while the
15 Authority and the courts interpreted the Reform
16 Act. So, if something that those regulations
17 --

18 JUSTICE SOTOMAYOR: No, that was
19 interpreting what agency and what was a
20 component of DoD was --

21 MR. FLOWERS: I disagree.

22 JUSTICE SOTOMAYOR: -- and you're
23 saying that -- I don't see how you could read
24 it otherwise -- that you are acting as a -- as
25 an agent of DoD and so you are a component of

1 DoD. That's what one of the amici argues --

2 MR. FLOWERS: Well --

3 JUSTICE SOTOMAYOR: -- and I want to
4 find out from the Solicitor General's Office
5 why they don't think that argument is
6 compelling.

7 MR. FLOWERS: So I -- I don't think
8 that argument works. Being an agent does not
9 make one a component of the principal. It
10 makes them an agent of the principal. Usually,
11 it is a non-component that serves as the agent
12 in all sorts of other contexts.

13 But back to 7135, what it says is that
14 those regulations, decisions, et cetera,
15 continue to apply unless they're superseded by
16 the Reform Act itself, which, here, this is
17 because we --

18 JUSTICE SOTOMAYOR: But the Reform Act
19 had the same definition of -- of an agency and
20 executive department as it did then, so it
21 wasn't changing anything.

22 MR. FLOWERS: That no -- that none of
23 those decisions ever interpreted. But, beyond
24 that, or a decision issued under the Reform
25 Act, which could be a decision from the

1 Authority or the courts.

2 So the courts are not bound to
3 continue to adhere to those regulations. If
4 you look at INS v. FLRA, that's 855 F.2d 1454,
5 it's a Ninth Circuit case from three decades
6 ago recognizing that. So 7135 does not do the
7 work they would like it to do.

8 Ultimately, what they -- I understand
9 this is a strange arrangement, but what they
10 have to show is that the state entity is a
11 federal agency for purposes of the Reform --

12 JUSTICE JACKSON: But why do they have
13 to show that? I mean, do you -- do you concede
14 that our task is to ascertain the will of
15 Congress with respect to what entities it
16 intended to be covered by the Reform Act?

17 MR. FLOWERS: No, I would not concede
18 that. I would say the task is to determine
19 what the word "agency" means in the Reform Act.

20 JUSTICE JACKSON: Only insofar as
21 Congress used that term and so we're trying to
22 figure out what Congress meant when it said
23 agencies in the context of this.

24 MR. FLOWERS: I think we're not asking
25 about their subjective intents. We're asking

1 about the objective meaning --

2 JUSTICE JACKSON: No, I'm asking
3 objective. I'm saying surely -- surely you're
4 not saying that we can just decide whatever we
5 want about this policy without reference to
6 what Congress intended.

7 MR. FLOWERS: As long as congressional
8 intent is interpreted with respect to the
9 statute, the statute defines --

10 JUSTICE JACKSON: All right. Let
11 me -- let me give you the statute.

12 MR. FLOWERS: Sure.

13 JUSTICE JACKSON: The statute uses
14 "agency."

15 MR. FLOWERS: Mm-hmm.

16 JUSTICE JACKSON: And that does
17 reference or refer to the generic term of
18 "agency" in, you know, the listed enumerated
19 departments.

20 But I guess what I don't understand is
21 why we have to automatically believe that when
22 Congress included "agency" in the Reform Act,
23 they were necessarily only incorporating those
24 listed entities, as opposed to talking about an
25 agency insofar as it employs, hires, fires, and

1 supervises federal employees.

2 So it uses the term "agency" and I get
3 that. And we have another section that says
4 these are the agencies. DoD is on that list.

5 MR. FLOWERS: Mm-hmm.

6 JUSTICE JACKSON: And to the extent
7 that any of those agencies are entities that
8 are hiring, firing, and employing federal
9 employees, we think that that's really what
10 Congress was caring about for the Reform Act
11 purpose, for the collective bargaining purpose.

12 So I guess my question is, why
13 wouldn't any entity that is under the purview
14 of a listed agency that hires, fires, and
15 employs, it functions like the agency for the
16 purpose of employment, be covered by the Act?
17 And, alternatively, why would Congress intend
18 to carve you out when you are functioning in
19 that world?

20 MR. FLOWERS: So I'll take them in
21 reverse order. Why would they want to function
22 as a -- carve us out, I think, is because it
23 does make more practical sense to route these
24 things through the Defense Department.

25 JUSTICE JACKSON: But they don't say

1 that.

2 MR. FLOWERS: But what they --

3 JUSTICE JACKSON: Wouldn't we expect
4 to see that in the statute? They've excluded
5 other things specifically as agencies. So, if
6 you're right and that was their intent, we
7 would see the words "but not Adjutant General
8 or," you know, "National Guard" in this
9 statute, especially in light of the history
10 that Justice Sotomayor points out.

11 MR. FLOWERS: No. So I think that an
12 agency has to justify its power. They have to
13 point to the statutory clause that gives them
14 power. Otherwise, they don't have any. So the
15 presumption starts they don't have it until
16 they identify it.

17 JUSTICE JACKSON: Right.

18 MR. FLOWERS: They point to the --

19 JUSTICE JACKSON: And the agency is
20 DoD, and everybody agrees they have this power
21 over -- over you all in the sense that you are
22 organizing and hiring and firing.

23 MR. FLOWERS: And there is no other
24 context that we have found in which the FLRA
25 interprets entities that act as the agent or

1 designee for any of those departments to be
2 agencies themselves.

3 If they hire a private contractor and
4 task them with doing something that they
5 otherwise would have exclusive power to do,
6 they don't count. This Court in Maryland v.
7 United States held that state militias are not
8 --

9 JUSTICE JACKSON: Well, we're not
10 looking for agencies in general. We don't care
11 if you're an agency for other purposes. The
12 only thing it seems as though the statute cares
13 about is whether there's an entity that is
14 hiring, firing, and supervising these employees
15 because the statute is about their collective
16 bargaining rights.

17 MR. FLOWERS: Well, respectfully, I
18 don't know how we get to that interpretation.
19 The definitions we point to are for purposes of
20 Title V. The Reform Act is in Title V. And we
21 don't come within any of those definitions.
22 And that's why you see the amici and the
23 Authority insisting that there must be some way
24 to get there. It must be justified somehow,
25 but no can settle on --

1 JUSTICE JACKSON: That it's not
2 agency?

3 JUSTICE KAGAN: Well, we try to make
4 sense of statutes as a whole.

5 MR. FLOWERS: Mm-hmm.

6 JUSTICE KAGAN: And this statute gives
7 collective bargaining rights to these
8 employees, and you acknowledge that.

9 And this statute also says that with
10 respect to these employees, and this is a kind
11 of sui generis situation, the federal
12 government is not acting as their employer.
13 Instead, the federal government per the statute
14 has the individual state guards acting super --
15 acting as their employer, supervising them,
16 hiring, firing them, and so forth.

17 So then the question becomes, so who's
18 supposed to be sitting across the collective
19 bargaining table with them? Because we know
20 that there's supposed to be a collective
21 bargaining table, and we know that somebody has
22 to be sitting on the other end, and we know
23 that it -- that this statute doesn't really
24 make sense for DoD to be sitting on the other
25 end because -- because Congress has told DoD

1 you can't be the employer. You have to make
2 the state guard the employer.

3 So you put that all together, it
4 should be the state guard that's sitting across
5 the table per what Congress said.

6 MR. FLOWERS: So let me -- let me try
7 to push back on that. It does make more sense
8 for the Defense Department to be there. For
9 one thing, they control many --

10 JUSTICE KAGAN: I'm not talking
11 about -- it does not make sense. It's like,
12 you know, Congress has told you who it wants to
13 be sitting across the collective bargaining
14 table, and the way Congress has said that is
15 Congress has said to DoD: You have to give
16 over your supervisory and employment authority
17 to the state guards.

18 MR. FLOWERS: I think the -- I think
19 the premise is wrong. They do -- we -- we
20 manage their day-to-day activities, yes, but
21 the Department of Defense issues regulations
22 that control most aspects of their work, even
23 the hours. So the Department of Defense is in
24 charge of many of the things they do.

25 I don't want to sit down before I say

1 this: The Department of Defense is the one
2 that withholds the dues. So, for example,
3 here, we were ordered to withhold dues. We
4 cannot do that. We don't --

5 JUSTICE KAGAN: But what you're
6 basically saying to us, your position when you
7 get right down to it, is the suit was against
8 the wrong people because -- because everybody
9 has always understood who the collective
10 bargaining agent is in the wrong way, and from
11 now on, collective bargaining as to these
12 employees has to be done on a nationwide basis
13 by the Department of Defense, as opposed to
14 state by state by the individual Guards and
15 Adjutants General.

16 MR. FLOWERS: I don't believe that's
17 --

18 JUSTICE KAGAN: That's the -- isn't
19 that?

20 MR. FLOWERS: No.

21 JUSTICE KAGAN: You -- you said
22 yourself you need a collective bargaining
23 partner. You're saying that partner needs to
24 be DoD. So DoD does that on a nationwide
25 basis, as opposed to the state Guards doing it

1 state by state --

2 MR. FLOWERS: So it's --

3 JUSTICE KAGAN: -- as has been done
4 for decades.

5 MR. FLOWERS: Respectfully, it's the
6 last part I disagree with. Even if the Defense
7 Department is the relevant entity, the FLRA can
8 still certify regional units to do the
9 negotiation on a region-by-region basis.

10 And -- and, again, they control many
11 of the aspects over which disputes might arise
12 and which they may well wish to collectively
13 bargain. So it does make more sense that they
14 -- they collectively bargain with the entities
15 that the law says are their employers.

16 JUSTICE JACKSON: But that has --

17 CHIEF JUSTICE ROBERTS: It does seem
18 to me odd -- and I understand that this is --
19 the state National Guards are unusual entities
20 in that they have, you know, status under the
21 state authority and, of course, under some
22 circumstances, under -- under federal, but how
23 does it actually work?

24 In other words, you recognize that
25 you're bound by the results of the collective

1 bargaining between the -- that the dual
2 technicians are permitted to engage in, right?
3 And you -- I mean, who negotiates that? You
4 want it to be the Department of Defense, right?

5 MR. FLOWERS: And I think they would
6 involve all the relevant actors. But, yes,
7 ultimately.

8 CHIEF JUSTICE ROBERTS: Yeah. But
9 they're not the ones that do the supervising or
10 day-to-day management of the dual technicians'
11 responsibilities, right?

12 MR. FLOWERS: They do set regulations
13 that basically control the way we can supervise
14 them on a day-to-day basis. So we do it, but
15 subject to myriad regulations that govern all
16 sorts of aspects of their work, including their
17 hours, I should -- I should note.

18 CHIEF JUSTICE ROBERTS: Well, but it
19 -- it does seem odd to have one entity doing
20 the negotiation and another entity doing the
21 supervision.

22 MR. FLOWERS: But, respectfully, I
23 think it -- it's not as odd as reading agency,
24 the word "agency," in a generally applicable
25 federal law that's about the federal government

1 to include entities that exist solely as a
2 matter of state law.

3 JUSTICE KAVANAUGH: But it --

4 MR. FLOWERS: The states --

5 CHIEF JUSTICE ROBERTS: No, I
6 understand --

7 JUSTICE KAVANAUGH: Keep going.

8 CHIEF JUSTICE ROBERTS: I was just
9 going to say I understand your -- your -- your
10 legal argument, but I'm trying to see whether
11 or not it makes sense may have a lot to do
12 about how it operates on the ground.

13 MR. FLOWERS: And -- and I think it
14 does make sense because the Department of
15 Defense, once they're there, can, A, bring that
16 military expertise to bear. So, frankly, in
17 terms of why we care about this, why it's not a
18 mere practicality, we have much greater trust
19 in the Department of Defense to work these
20 disputes out before they even become disputes,
21 without compromising our military interests,
22 far more than an independent federal -- federal
23 agency that's concerned with labor law. But
24 they -- and they have the tools to do all that
25 because they have immense control over the

1 technicians, they have immense influence over
2 us, and, unlike the Authority, they're
3 subordinate to the President. So --

4 JUSTICE KAVANAUGH: But you hire --
5 you hire the technicians, correct?

6 MR. FLOWERS: We do.

7 JUSTICE KAVANAUGH: Right. And you
8 do, I think you said, day-to-day supervision of
9 them, correct?

10 MR. FLOWERS: That's true.

11 JUSTICE KAVANAUGH: And the oddity of
12 -- of the case is that you're not a federal
13 officer, yet federal law requires you to do
14 that, and you do it.

15 MR. FLOWERS: And I think that's
16 dispositive. Yes.

17 JUSTICE KAVANAUGH: And you're not
18 challenging the constitutionality of that, just
19 -- correct?

20 MR. FLOWERS: Well, we -- we -- no,
21 not --

22 JUSTICE KAVANAUGH: Of that specific
23 --

24 MR. FLOWERS: Yes. Yes, that's right.

25 JUSTICE KAVANAUGH: -- role?

1 MR. FLOWERS: But I think that --

2 JUSTICE KAVANAUGH: But then, to go
3 back to the point about the word "agency," you
4 agree that DoD, as well as the Department of
5 Air Force and Army, are agencies, correct?

6 MR. FLOWERS: Correct.

7 JUSTICE KAVANAUGH: Okay. And then
8 the statute says in this unusual context DoD is
9 acting through the state Guard to, as you just
10 said, hire, supervise the people, and that's
11 the natural -- if we have to make sense of
12 this, that's the natural person then who would
13 be sitting across from you at the collective
14 bargaining table in the first --

15 MR. FLOWERS: That -- that might have
16 been a better way to write the statute, but I
17 see no way to get from the fact that we're
18 their agent to the -- to the conclusion that we
19 are the Department of Defense. That's not
20 usually how I prove --

21 JUSTICE KAVANAUGH: Acting on behalf
22 of the Department of Defense as assigned by
23 Congress.

24 MR. FLOWERS: Which would mean that
25 they are bound by the agreement, not us.

1 JUSTICE KAVANAUGH: Right. And then
2 one other kind of different angle on the -- on
3 the history of this, this -- am I -- correct me
4 if I'm wrong, and this -- ultimately, you're
5 going to say the text controls, and I agree,
6 but I just still want to know the history,
7 which was, in the '70s, this was an issue, and
8 state guards were objecting to their role on
9 this and tried to get a carveout in Congress,
10 and that was -- came up in the context of the
11 military union and the separate legislation,
12 and it was in the Senate bill but failed in the
13 House bill and it never made it. The carveout
14 that would have changed the statute and solved
15 your concern never made it.

16 MR. FLOWERS: Well, that -- that
17 solution would have been to a slightly
18 different problem, which is they wouldn't have
19 bargaining rights at all.

20 JUSTICE KAVANAUGH: Mm-hmm.

21 MR. FLOWERS: So we -- again, we're
22 not disputing that they have rights.

23 JUSTICE KAVANAUGH: Right. That would
24 have solved your problem.

25 MR. FLOWERS: I -- it would -- yes, if

1 they didn't have rights at all, then they could
2 not go to the Authority to enforce those
3 rights.

4 JUSTICE KAVANAUGH: Right.

5 MR. FLOWERS: That's true. But,
6 ultimately --

7 JUSTICE KAVANAUGH: I -- I agree the
8 text controls, but that history illuminates
9 this is not some isolated thing that was
10 inadvertent, I don't think.

11 MR. FLOWERS: No. I --

12 JUSTICE KAVANAUGH: At least that
13 Congress didn't pay attention to at some point.

14 MR. FLOWERS: I fully grant that, but
15 when we're talking about an agency's exercise
16 of power, they've got to ground it in the text,
17 as you recognized, and I think, here, we're
18 talking about penumbras, not the text.

19 JUSTICE SOTOMAYOR: So what instead
20 you're arguing now is it's a pyrrhic victory,
21 because they kept collective bargaining rights,
22 they could have it against Do -- the Department
23 of the Army, but they can't enforce it against
24 anybody.

25 MR. FLOWERS: Not -- not pyrrhic in

1 any way. They can enforce it against the
2 Department of Defense.

3 JUSTICE SOTOMAYOR: Well, but you're
4 telling me the Department of Defense can't sue
5 you for it. That's how you answered Justice
6 Barrett.

7 MR. FLOWERS: They cannot sue us.

8 JUSTICE SOTOMAYOR: They can just use
9 other pressures, but they can't have any
10 enforceable right against you in court?

11 MR. FLOWERS: Right. So, of course,
12 my first answer is we're stuck with the law
13 Congress passed, whether or not it makes sense,
14 but I think that does make sense --

15 JUSTICE SOTOMAYOR: Oh, I agree with
16 you.

17 MR. FLOWERS: Okay.

18 JUSTICE SOTOMAYOR: We're stuck -- you
19 and we are stuck.

20 MR. FLOWERS: Yeah. Yeah.

21 (Laughter.)

22 MR. FLOWERS: But the -- the --

23 JUSTICE SOTOMAYOR: And so I go back
24 to my original question. However they -- else
25 they viewed the word "agency" or "department"

1 anywhere else in any other part of the law, at
2 least with respect to this issue, they had the
3 Mississippi decision?

4 MR. FLOWERS: So the Mississippi --

5 JUSTICE SOTOMAYOR: And that decision,
6 basically, the Thompson decision, basically
7 said you negotiate the collective bargaining
8 unit, you're acting on behalf of the Department
9 when you do it, the terms are approved by the
10 Department, so the Department has said to you
11 these are -- terms are okay, and if you breach
12 the agreement, then you have to suffer the
13 decision of the agency in charge of deciding
14 whether there was a breach or not. That's as
15 simple as I see this case.

16 MR. FLOWERS: Sure, but then 7135
17 says, if that ruling is superseded by the Act,
18 which this is because it defines --

19 JUSTICE SOTOMAYOR: But the Act didn't
20 change the definitions.

21 MR. FLOWERS: It doesn't -- it didn't
22 consider the definitions, but that decision
23 didn't consider the definitions I --

24 JUSTICE SOTOMAYOR: So it didn't
25 change the interpretation of those definitions.

1 MR. FLOWERS: That I disagree with.
2 The relevant definitions predate that order.
3 The order never considered the definitions.
4 And, in any event, whatever that Assistant
5 Secretary of Labor thought he was doing, the
6 statute here plainly says "agency." And even
7 -- even the government doesn't argue they're
8 bringing --

9 JUSTICE SOTOMAYOR: So, if we -- and
10 -- and you're willing to say there's no legal
11 remedy?

12 MR. FLOWERS: So I --

13 JUSTICE SOTOMAYOR: There's a
14 political pressure remedy, but there's no legal
15 remedy for rights that were clearly granted by
16 Congress and intended by Congress?

17 MR. FLOWERS: I -- I -- I really
18 dispute that there's no legal remedy because a
19 remedy against the Department is going to be
20 effective. They have immense influence over
21 us.

22 JUSTICE JACKSON: Yes, but it's going
23 to be different. I mean --

24 MR. FLOWERS: But it --

25 JUSTICE JACKSON: -- I -- I appreciate

1 -- I appreciate that you keep coming back to
2 the textual it says "agency," but I -- I would
3 posit that the real question is, what did
4 Congress intend when it used "agency" in the
5 statute in that way?

6 MR. FLOWERS: Well, we know what they
7 intend --

8 JUSTICE JACKSON: And to follow your
9 line of reasoning, we would have to believe
10 that Congress intended for dual-status service
11 workers in this nature to have a different,
12 weaker form of collective bargaining rights
13 because, unlike other federal civilian
14 employees who could sue the people who -- or,
15 excuse me, who could bargain with the people
16 who supervise them, they couldn't directly.
17 They would have to go through -- I understand
18 it's possible to -- to figure out a way for
19 them to enforce their rights, but why would
20 Congress -- given all this history, the
21 background of the statute, the fact that they
22 considered it, why would they have wanted
23 dual-service status workers to have a different
24 kind of collective bargaining right than other
25 similarly situated employees?

1 MR. FLOWERS: Absolutely. Is it okay
2 if I answer?

3 CHIEF JUSTICE ROBERTS: You may answer
4 briefly, yes.

5 MR. FLOWERS: So two -- two quick
6 answers. First, again, they have to say we're
7 the agency, and I want to emphasize even the
8 Authority does not claim that we are an agency.
9 They are not making that argument. They say
10 we're the representative of, not that we are.

11 Second, why would they want to do it?
12 I think it's important to realize that these
13 technicians serve, even in their civilian
14 capacity, very important military tasks. And
15 it's perfectly reasonable for Congress to say,
16 in that context, we want the Defense Department
17 involved because they answer to the President
18 and they have to make sure that whatever is
19 being done doesn't frustrate his
20 commander-in-chief powers.

21 And think, in this case, the general
22 counsel wanted us to go base to base and engage
23 in basically a speaking tour where we would
24 apologize to the technicians and tell them we
25 had violated our rights.

1 JUSTICE JACKSON: But haven't you --

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Thank you, counsel.

4 Justice Thomas?

5 JUSTICE THOMAS: Just briefly,
6 could -- in your delegation of authority, could
7 it explicitly authorize you to not only
8 administer but also to serve as the -- well, it
9 would be more of an imposition that you are
10 also the defendant in these cases or respondent
11 in these cases?

12 MR. FLOWERS: Congress could do that,
13 and it's actually done it in other contexts,
14 not with respect to the Reform Act. And I do
15 want to note that --

16 JUSTICE THOMAS: No, no, I'm talking
17 about the Defense Department in its delegation
18 to you.

19 MR. FLOWERS: So the statute delegates
20 to us the power to hire them. I do believe the
21 Defense Department through regulations could
22 say, if you want technicians, you have to agree
23 to collectively bargain on our behalf. I don't
24 think they could give the authority and the
25 power to issue orders to us, but they could

1 make us bargain for them.

2 And I -- I do want to briefly
3 emphasize 709(e), the designation statute, is
4 not about the Reform Act. That is a general
5 statute that says we have power over
6 technicians. So it -- that -- that's not
7 unique to the Reform Act in any way.

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: I'm going back to
11 Justice Kagan's venerable rule, if it ain't
12 broke, don't fix it.

13 And we know that it hasn't been broken
14 because either under the executive orders for
15 decades, national guards did go through the
16 administrative processes as the named
17 responding party. They've been doing so in
18 this context. But I think, most importantly,
19 under Article I, military matters are left to
20 the executive.

21 And we should be doing very little to
22 interfere in that process. And this is a major
23 interference in you saying to us we are not --
24 we can be designated as the employer, we can
25 have Adjutant Generals foisted on us, we can be

1 given permission as we have been to bargain,
2 but we can't be forced to honor our bargains.
3 That's basically what you're saying. We can't
4 be legally forced. That's what you're saying
5 to us.

6 MR. FLOWERS: We're not -- it's not
7 that we can't be. It's that Congress hasn't
8 done it. And so, if it ain't broke, don't fix
9 it, coming back to --

10 JUSTICE SOTOMAYOR: Yeah, but Congress
11 hasn't fixed it. Congress has looked at the
12 state of affairs for I don't know how long, and
13 even when the National Guards ask Congress not
14 to let the technicians collectively bargain,
15 Congress rejected that request.

16 And now you're asking us to permit
17 labor bargains to threaten national security
18 because there's no peaceful way to adjudicate
19 this before an agency.

20 MR. FLOWERS: I think the principle
21 that Congress is in charge is absolutely right.
22 But, here, there is no way, I think even the
23 Authority would concede, to read agency to mean
24 us. They have to have this round-about that's
25 good for one ride and one ride only with --

1 when we get to Adjutants General.

2 In terms of that longstanding practice
3 and why is it -- is it broken or not, it is
4 broken. Anytime you have an agency --

5 JUSTICE SOTOMAYOR: It's only broken
6 because you're the first National Guard to say
7 we won't honor our commitments.

8 MR. FLOWERS: Anytime you have an
9 agency exercising authority that Congress
10 hasn't given it, there's a serious problem.
11 Agencies do not acquire power by adverse
12 possession. It would be highly dangerous to
13 say that as long as an agency keeps violating
14 the law, we'll let it slide. If they do it
15 once or twice, that's not okay.

16 Here, we're in the position where
17 they've been violating it repeatedly, and this
18 Court has not been shy in other cases, whether
19 it's McGirt or Janice, to correct past
20 practices that have been going on a long time
21 but that are contrary to law.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: It's, of course, true
24 that many, many times in the law we ascribe the
25 actions of principals to agents, and,

1 conversely, we require the same things of
2 agents that we do of principals. So that's
3 true in many contexts where we essentially say
4 we're going to treat the agent and the
5 principal as one because the agent is just
6 exercising the authority of and acting on
7 behalf of the principal.

8 And the way I see this case is, is
9 this one of those contexts? And can we
10 understand the reference to agency with respect
11 to this issue as also a reference to the
12 agency's agents, who in this case are you and
13 your fellow Adjutant Generals?

14 And -- and -- and there I do, you
15 know, trying to make sense of an entire
16 statute, I think about the -- the fact that
17 there is an explicit delegation from the --
18 from -- from D -- an explicit delegation that
19 Congress wrote requiring DoD to give its power
20 to you with respect to these employees, and
21 there is also an explicit provision which you
22 acknowledge saying that these employees have
23 employment rights, including the right to sit
24 down and collectively bargain with their
25 employer.

1 And the question is, who is that
2 employer? And you say they have to sit down
3 with DoD. The consequence of your position is
4 that the employee -- is that the Adjutant
5 Generals are out of the picture and DoD takes
6 over.

7 But I guess I'm wondering why, given
8 that there's been this explicit delegation for
9 you to supervise and hire and so forth these
10 employees, why anybody would read the statute
11 to do that rather than simply to read the
12 statute as putting you in the shoes of DoD when
13 it comes to this activity?

14 MR. FLOWERS: So there are certainly
15 instances where an agent's bound by whatever
16 order is issued to the principal, but that's
17 expressly. So, for example, Rule 65 expressly
18 says agents are bound.

19 I am not aware of any area in the law
20 where agents by serving as agents become
21 principals and that's what they would need to
22 show, the Authority has to show that to win
23 this case, because unless we are the Department
24 of Defense, they can't issue the order against
25 us.

1 They do not even argue that we're the
2 Department of Defense. And if the argument
3 here is that we become agencies by serving as
4 representatives, that is yet a new version of
5 the argument, which just shows I think that
6 we're looking for some way to say it must be in
7 there somewhere when it's not naturally there.

8 So then I get to, why does it make
9 sense to do it this way? I -- I do want to
10 emphasize this. Many of the things that the
11 technicians will want to bargain over are
12 wholly within the Department of Defense's
13 control. They withhold the dues. So the order
14 here said we have to withhold dues.

15 We cannot do that. We don't issue the
16 checks. We can ask them to do it, but we can't
17 do it ourselves. They issue regulations that
18 control all aspects of their work. They want
19 to bargain over that, nothing the State Guard
20 can do.

21 And, finally, I think it's really
22 critical to emphasize the importance of the
23 President's control over the Department of
24 Defense. The general counsel of the FLRA in
25 this case, as I started to mention, wanted us

1 to go base to base and do -- and -- and get up
2 and explain that we erred, we misinterpreted
3 the Act, and apologize.

4 I think the Department of Defense
5 would have been far more likely to say:
6 Absolutely no way. That would be detrimental
7 to the chain of command. Here, thankfully, the
8 ALJ didn't impose that, but the general counsel
9 asked for it.

10 And I think that shows that that --
11 the failure to appreciate the sort of
12 military-specific concerns there shows why it
13 does make practical sense to channel these
14 things before the Defense Department.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: Two quick things.

19 MR. FLOWERS: Sure.

20 JUSTICE KAVANAUGH: One, the
21 collective bargaining agreement here is
22 approved by DoD, correct?

23 MR. FLOWERS: Right. And, again, we
24 don't dispute that they could be held bound by
25 it.

1 JUSTICE KAVANAUGH: Right. And the
2 statute requires that these collective
3 bargaining agreements be approved by DoD, is
4 that correct?

5 MR. FLOWERS: I think that's actually
6 somewhat ambiguous. The head of the agency has
7 to approve it, so they consider themselves the
8 head of the agency, which I assume to be the
9 Department of Sec -- of the Army or Air Force,
10 which is yet another reason why I think it --

11 JUSTICE KAVANAUGH: But DoD in this
12 case did approve the --

13 MR. FLOWERS: It approved, yes.

14 JUSTICE KAVANAUGH: -- the relevant
15 collective bargaining agreement and there is a
16 statute. I take your point on that.

17 MR. FLOWERS: And --

18 JUSTICE KAVANAUGH: And then second
19 question was, on your point about agencies
20 can't acquire authority by adverse possession,
21 if you go back to the '70s -- I mean, I agree
22 with that point, obviously, but if you go back
23 to the '70s in the Thompson Field decision,
24 even if you think that's wrong, what do you do
25 with the unusual savings clause?

1 I know you've referenced it before,
2 but that itself is an unusual provision to say,
3 well, to the extent agencies have done
4 something, we, Congress, are preserving that
5 unless superseded by a further regulation or by
6 the President, et cetera, or by provisions of
7 this chapter?

8 In other words --

9 MR. FLOWERS: Or a decision issued
10 under this chapter, which would include a
11 judicial decision. So, if this Court
12 interprets the Reform Act in a way that is
13 inconsistent with the regulations, the law
14 Congress passed wins. And that's what --
15 again, I pointed to that INS v. FLRA case.
16 That's how Judge Wallace in a very thorough
17 opinion --

18 JUSTICE KAVANAUGH: Yeah, I'm not --
19 okay. That's an interesting point. I'm not
20 sure I'm fully sure of that, but I'll let it go
21 for now, okay?

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: On page 28 of your

1 opening brief and page 9 of your reply, you
2 point out there are other contexts in which
3 states designate officials to administer
4 federal law. You point to Medicaid. You point
5 to elections officials.

6 And I want to know if you are just
7 invoking those as examples for why it would be
8 odd to consider the Adjutant General to be an
9 agent or an -- you know, a federal officer or
10 subcomponent, or are you saying that there
11 would be implications of our decision that
12 might pull some of these people who Congress
13 did not intend to be included in -- in the Act?
14 You know, are there -- are there other
15 provisions of federal law that ruling against
16 you might mess up? I just wasn't --

17 MR. FLOWERS: Sure.

18 JUSTICE BARRETT: -- really clear
19 whether you were making an argument about this
20 could really have had consequences or if you
21 were just saying this is an example for why the
22 government's position doesn't make sense.

23 MR. FLOWERS: It -- more why it
24 doesn't make sense. What we use those statutes
25 for is to show that even when you're designated

1 to fulfill a role for the federal government
2 that's completely within the federal
3 government's control and discretion, you don't
4 become the federal government itself. As in
5 those contexts, we do point to the
6 Intergovernmental Personnel Act, where the
7 federal government actually does have its
8 employees go work for tribes, local
9 governments, and so on, where, as far as we can
10 tell, they would never say the tribes become
11 entities of -- of the federal government.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yeah. In response
15 to Justice Kagan, you -- and, again, in
16 response to Justice Barrett, you keep saying we
17 aren't DoD. And I guess I don't understand
18 that. Why aren't you for the purpose of
19 employing -- for the purpose of this particular
20 statute? Isn't that the work of the agency
21 analysis such that the best reading of the
22 statutory terms is that you are acting as DoD
23 for the purpose of the statute and are
24 therefore covered by the laws that govern labor
25 relations in regard to these employees, given

1 your role as their employer?

2 MR. FLOWERS: I'd -- I'd refer you to
3 the last couple paragraphs of Judge Tatel's
4 majority opinion in Sealed Case, and what he
5 explains there is that the question whether
6 someone is an entity, is an agency, isn't a
7 metaphysical inquiry. It depends on statutory
8 definitions. So they have to find a statute
9 that makes us part of the Department of
10 Defense. They can't -- they -- they don't --

11 JUSTICE JACKSON: Yeah, but what
12 you're doing is you are -- are not taking into
13 account the common law agency relationship.
14 So, yes, if we didn't have any kind of
15 relationship between you and DoD and we were
16 just asking the question are you an agency, I
17 agree with you.

18 But I guess Justice Kagan's point was
19 we have some entity that everybody agrees is an
20 agency under the statute, and you are
21 designated by Congress, are required by
22 Congress to step into their shoes for the
23 purpose of administering this statute with
24 respect to labor relations. So, in that
25 context, why aren't you the agency for the

1 purpose of this?

2 MR. FLOWERS: So those common law
3 principles help us and not them, which is why
4 they don't cite them. A principal is bound by
5 the actions of its agent. An agent does not
6 become the principal by serving as the agent.
7 They need to show that we are part of the
8 Department of Defense. And acting as the agent
9 of the Department of Defense doesn't make you
10 the Department of Defense, just as a military
11 contractor who works for the Department of
12 Defense is not part of the Department of
13 Defense.

14 JUSTICE JACKSON: So you're saying
15 that --

16 MR. FLOWERS: Indeed, they're --

17 JUSTICE JACKSON: -- so you're saying
18 that -- I understood that the principal as you
19 say is bound by the activity of the agent. So,
20 in this -- in this case, let's say you agreed
21 that you would collectively bargain on behalf
22 of DoD and you made certain concessions.

23 Are you saying that DoD would not be
24 bound by those in -- in terms of its
25 understanding of the labor relationship that

1 you created?

2 MR. FLOWERS: The Department of
3 Defense may be bound by what we do.

4 JUSTICE JACKSON: Okay.

5 MR. FLOWERS: But we -- but --

6 JUSTICE JACKSON: What you did in --
7 across the bargaining table, they would be
8 bound by it. Those employees couldn't say
9 there's some other labor thing happening. If
10 you had made representations at the collective
11 bargaining table, you would bind DoD, is that
12 right?

13 MR. FLOWERS: As long as we were
14 acting as their agent, which they say we are,
15 yes.

16 JUSTICE JACKSON: Okay. So why -- I'm
17 sorry, why doesn't that make you then
18 responsible for sitting across from these
19 employees in the context of the collective
20 bargaining relationship as Congress understood
21 it?

22 MR. FLOWERS: Because that's -- I
23 guess it might, but the question that we're
24 asking is, are we an agency? That's the only
25 question in this case. We have to be an

1 agency, or the Authority does not have the
2 ability to issue orders to us. That's
3 conceded. I don't think anyone is disputing
4 that. And we don't become an agency by being
5 the agent.

6 And, indeed, every federal employee is
7 an agent of the federal government. We don't
8 say they're all agencies.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Reaves.

12 ORAL ARGUMENT OF NICOLE F. REAVES
13 ON BEHALF OF THE FEDERAL RESPONDENT

14 MS. REAVES: Mr. Chief Justice, and
15 may it please the Court:

16 Petitioners are required to comply
17 with the Act and submit to the FLRA's orders in
18 cases like this one because of the role they
19 play in the federal employment system. It is
20 uncontested that dual-status technicians have
21 collective bargaining rights because they are
22 federal civilian employees who are employed by
23 parts of DoD, a covered agency. And under
24 Section 709(d) of Title 32, Petitioners employ
25 and administer technicians pursuant to a

1 designation of federal authority from DoD.

2 Other provisions confirm that role.

3 For example, Section 2105 of Title V provides
4 that an Adjutant General appoints technicians
5 into the federal civil service when he hires
6 them. Adjutants General thus only hire, fire,
7 and supervise employees of DoD because they are
8 acting as if they are part of and on behalf of
9 that agency.

10 Similarly, as Petitioners seem to
11 concede in their reply and as multiple
12 provisions in the Act indicate, the Act
13 requires compliance by components and entities
14 that are designated to act on an agency's
15 behalf. And that is exactly how Petitioners
16 behave when employing technicians. Petitioners
17 therefore must both bargain with technicians
18 and comply with the FLRA's orders.

19 And if accepted, Petitioners'
20 arguments would upend 50 years of uninterrupted
21 collective bargaining between technicians and
22 state Adjutants General. In a late-breaking
23 argument, Petitioners suggest that they may be
24 required to bargain under the Act so long as
25 DoD, instead of the FLRA, enforces any order

1 issued against them.

2 But that would not negate the right
3 that the Act actually gives to technicians, a
4 right to bargain with their direct supervisors
5 subject to the FLRA's enforcement authority.
6 And it makes no sense to require DoD to
7 threaten the nuclear option of withholding
8 federal funding or recognition to state
9 National Guards to enforce routine FLRA orders.

10 Because Petitioners have decided to
11 accept the benefits that come with employing
12 technicians, they must also accept the limited
13 bargaining obligations that come along with
14 those benefits.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: As I hear Petitioner,
17 the argument is that, of course, we are
18 delegated this authority to hire the
19 technicians and to supervise them, but that
20 does not convert us into an agency for the
21 purposes of the relevant statute.

22 How do you respond to that?

23 MS. REAVES: The term "agency" in the
24 statute includes and requires compliance by
25 components and entities that are designated to

1 act on behalf of that agency, and that includes
2 sub-components within a federal agency. And
3 that's a thing that Petitioners are most
4 analogous to in this -- in this system that
5 Section 709(d) and Section 709(e) have set
6 forward.

7 It's hard to imagine how someone can
8 fully employ federal employees from the
9 perspective of they're being able to hire,
10 fire, and supervise federal employees'
11 day-to-day -- day-to-day employment activities,
12 without holding that they are, in fact, acting
13 as a component of an agency that's required to
14 bargain.

15 JUSTICE THOMAS: Well, the -- there's
16 always delegations from the head of agencies to
17 subparts, but those delegees are not converted
18 to agencies. They may be agents for a limited
19 purpose. They may have limited authority
20 that's delegated from the top. But they're not
21 converted to an agency. And I think that's the
22 leap that I'm having some difficulty with.

23 MS. REAVES: So I think it would be
24 helpful if I could maybe go through a few sets
25 of provisions in the Federal Service Labor

1 Management Relations Act that do indicate that
2 the actual bargaining requirement often lies
3 with a component of a federal agency, which I
4 think helps bridge that gap to then seeing that
5 Petitioners aren't like that component.

6 So the first set of provisions are the
7 definition of "collective bargaining" and the
8 definition of "appropriate unit." Those are on
9 page 3a and 5a of our statutory appendix. And
10 those indicate that bargaining is often done
11 not on a high-level agency basis but on an
12 agency, plant, installation, functional, or
13 other basis.

14 Now the second set of statutory
15 provisions that I think is helpful are the
16 exclusions from the definition of "agency."
17 Those are on page 3a of the statutory appendix.
18 And that excludes entities like the FBI and the
19 Secret Service.

20 And if we were to accept this
21 proposition that only the high-level agency is
22 required to comply with the Act and
23 collectively bargain, there would have been no
24 need for Congress to exclude the FBI and the
25 Secret Service because they aren't high-level

1 agencies. The FBI is part of DOJ. The Secret
2 Service is part of the Department of Homeland
3 Security.

4 JUSTICE KAGAN: I suppose what they
5 would say is, well, we get you as to the parts
6 of agencies, but the -- and the parts of
7 agencies aren't listed either, but we just
8 assume that by saying the Department of
9 Justice, we naturally mean as well the FBI, but
10 -- but we don't usually mean Ohio. And so
11 that's the difference.

12 So what gets you to Ohio?

13 MS. REAVES: What gets us to Ohio is
14 Section 709(d) and (e) and the designation of
15 federal authority. And this isn't just a
16 partial designation. It is a designation to
17 hire, fire, and control the day-to-day
18 employment obligations of dual-status
19 technicians.

20 JUSTICE GORSUCH: Well, and that's
21 where I want to pick up. So I'm just curious
22 about the federalism implications of this case.
23 Forget about the militia for the moment, okay?

24 Under the Spending Clause today, the
25 federal government effectively employs or

1 provides the budgets for 30 to 40 percent of
2 state budgets today. And many, many, many of
3 their employees, are they now in other cases
4 Medicare, Medicaid, the -- the examples that
5 Justice Barrett offered, are they now agents of
6 the federal government effectively? Are they
7 effectively federal agencies?

8 MS. REAVES: No, because in that
9 merely providing federal funding is not the
10 same as providing a designation of federal
11 authority to hire, fire, and supervise
12 employment.

13 JUSTICE GORSUCH: Let's -- let's say
14 Congress provides those similar kinds of
15 provisions in those other areas. We -- we --
16 we allow the states to hire and fire the
17 employees that we are funding, but it has to do
18 whatever we say, you know, you are now a
19 federal agency. I know you thought you were a
20 sovereign state, but it turn out you are, in
21 fact, a federal agency.

22 MS. REAVES: So two responses to that.
23 First of all, I think if -- the hypothetical
24 you just gave wouldn't convert them into
25 federal employees. If they were, in fact,

1 federal employees, not just federally funded,
2 and then the state was given the authority to
3 hire, fire, and supervise them in their
4 day-to-day federal roles, I think that would
5 look a lot like Petitioners here.

6 JUSTICE GORSUCH: Okay. So --

7 MS. REAVES: My second response --

8 JUSTICE GORSUCH: -- in other words
9 there is nothing in this case that's
10 particularly unique. Congress could replicate
11 this same structure with respect to other
12 Spending Clause programs?

13 MS. REAVES: It could replicate it,
14 but it is unique in that this is the only
15 statute, 709(d) is the only one that either we
16 or Petitioners have been able to identify where
17 a state employee supervises, hires, and fires
18 federal employees into a federal role.

19 JUSTICE GORSUCH: Now, I know we don't
20 have a constitutional commandeering-type claim
21 here, but is there some concern the government
22 has about converting state militia officers
23 into federal agencies?

24 MS. REAVES: So a couple of responses
25 to that. First --

1 JUSTICE GORSUCH: I'm sure -- I'm just
2 sure this is something you all have thought
3 about too, so I'm curious.

4 MS. REAVES: Absolutely. So I don't
5 think this case in any way implicates militia
6 concerns because as this Court recognized in
7 Babcock, dual-status technicians really do have
8 three separate roles. And one of those roles
9 is a federal -- federal military role, one is a
10 state military role, and one is a federal civil
11 service role. And that's the role that this
12 case is about.

13 And, in fact, dual-status technicians
14 are barred by federal statute from collectively
15 bargaining over the conditions of their state
16 and federal military service or active duty
17 change.

18 JUSTICE GORSUCH: And then, I'm sorry,
19 just to circle back, is there any limit you see
20 on -- on Congress's power to replicate this
21 scenario in other Spending Clause programs at
22 all or none? I'm -- I'm just curious.

23 MS. REAVES: I don't think -- I'm not
24 aware of any limit. I think obviously this is
25 a unique situation, and dual-status technicians

1 are, as this Court recognized in Babcock, an
2 extremely rare bird. And the --

3 JUSTICE GORSUCH: Well, I understand
4 that. But --

5 MS. REAVES: -- role that Adjutant
6 Generals have here --

7 JUSTICE GORSUCH: But the government
8 doesn't see any inhibition to Congress' power
9 to turn states into federal agencies for
10 purposes of whatever, you know, whether it's
11 collective bargaining or whatever other good
12 interest it has in mind?

13 MS. REAVES: Just two responses to
14 that. First of all, I think there's an
15 important component of this, the state consent,
16 you know, Petitioners have agreed that they
17 have consented to this system. And I think if
18 there wasn't that consent, and, you know, if
19 they didn't have the ability to cease hiring
20 and firing dual-status technicians that would
21 be a different situation.

22 But to the extent that there was a
23 central role and that Congress actually
24 wanted to make a bunch of state employees
25 federal employees and create state entities to

1 be federal employers of them, I think that
2 would look a lot like this. And I don't see
3 any distinction --

4 JUSTICE GORSUCH: Beyond concept, do
5 you see any other limits?

6 MS. REAVES: No, not that I'm aware of
7 right now.

8 JUSTICE SOTOMAYOR: Ms. Reaves, why --
9 why are you going so far? I -- I -- I -- I'm
10 just curious. This is a unique situation in
11 and of itself because it's a military setting.
12 And the militia, per the Constitution, is
13 intimately tied between Congress and the
14 states, correct?

15 MS. REAVES: That's correct.

16 JUSTICE SOTOMAYOR: I might have a
17 problem if -- with the anticommandeering if we
18 forced, even under the Spending Clause, states
19 to hire particular people, utilize them or
20 collective bargain on their behalf, that --
21 that really is a different issue than what's
22 involved in the military setting, isn't it?

23 MS. REAVES: Well, a couple of
24 responses to that. I don't think the
25 distinguishing feature of this case is the

1 military setting. You know, the basis for
2 these provisions is not the militia clauses but
3 it's the executive's ability to oversee
4 executive branch employees.

5 And I think to the extent we're --

6 JUSTICE SOTOMAYOR: All right. Fair
7 enough.

8 Now, the definition of executive
9 department and agency in Section 105 is used
10 throughout Title V. Going back to the question
11 that Justice Barrett asked, do we need to worry
12 if we adopt your broad definition of agency or
13 unit or component that we'll be causing
14 unforeseen issues for other provision?

15 MS. REAVES: No, you do not. And
16 that's because our argument is heavily grounded
17 on Section 709(d) and Section 709(e). And
18 those are unique provisions, that there is no
19 analog to, anywhere else in the U.S. code. And
20 to the extent that --

21 JUSTICE SOTOMAYOR: So your component
22 argument seems to follow the arguments of
23 amici, American Federation of Labor and
24 Congress of Industrial Organizations, they were
25 talking about the National Guards being a unit

1 or a component of DoD.

2 And I guess the counter to that
3 argument is that Section 10105 refers to
4 federally-recognized units and organizations of
5 the Army National Guard. How could these state
6 national guards be federally recognized units
7 or components?

8 MS. REAVES: So we're not relying on
9 the federal components or units argument
10 because as we envision this case, Petitioners
11 are acting in a federal civilian employment
12 role when they're employing dual-status
13 technicians. They aren't acting in their
14 federal military role in any way.

15 So I don't think that the right way to
16 analyze this case is the way that those amici
17 analyze it. I think the correct way to analyze
18 it is to recognize that dual-status technicians
19 have collective bargaining rights and then ask
20 who are those rights against and what do the
21 entities in this case look like as far as the
22 Act's provisions go. And Petitioners here look
23 the most like a component or a representative
24 of an agency who's exercising that agency's
25 authority in hiring, firing, and supervising

1 the day-to-day activities of federal --

2 JUSTICE ALITO: Isn't it odd --

3 MS. REAVES: -- civilian employees.

4 JUSTICE ALITO: -- to say that an
5 entity is a component of the federal government
6 for some purposes but not a component of the
7 federal government for other purposes?

8 MS. REAVES: I don't think so, because
9 I think that the Act itself is what provides
10 the definition of an indication of what is a
11 component.

12 Those two provisions I listed in
13 response to Justice Thomas's question, and also
14 there's a third set of provisions, there's
15 exclusions that the President can make to
16 collective bargaining under the Act. That's in
17 Section 7103(b) of the Act. And the President
18 can remove subcomponents of agency from the --
19 agencies from the Act.

20 So I actually think that in the
21 context of the act that's at issue here, it's
22 clear that components have to comply. And that
23 doesn't necessarily mean that's the case for,
24 you know, other provisions throughout the
25 federal code.

1 JUSTICE BARRETT: Ms. Reaves, is there
2 a distinction between, you're moving back and
3 forth between kind of sub-agency, component,
4 and representative.

5 Is there any legal distinction between
6 a sub-agency and a component and a
7 representative? I guess I would have thought
8 that representative was a stronger argument for
9 you than component or sub-agency for the
10 reasons that Justice Alito was saying.

11 MS. REAVES: So I think that there --
12 representative can be a little bit of a broader
13 meaning in some places in the Act. Sometime a
14 representative can be just an individual who
15 for the purposes of bargaining is going to the
16 table for bargaining purposes, and when we're
17 using the term representative here, we mean
18 that a little bit more broadly.

19 JUSTICE BARRETT: But I thought
20 designate was a big part of your argument. And
21 if you think of the Adjutant General as a
22 designee, that seems to me more like a
23 representative than a component.

24 MS. REAVES: So I think -- I really
25 think it's both. You know, there is some --

1 some component of that could be seen as
2 representative, but to the extent that
3 Adjutants General with very limited review have
4 final say on hiring and firing federal
5 employees that really makes them look more like
6 a component who similarly has kind of large
7 discretion to hire and fire --

8 JUSTICE JACKSON: Does anything turn
9 on that distinction that Justice Barrett is
10 pointing out? I mean, I thought that your
11 argument was: Let's figure out who is
12 functioning as the employer for the purpose of
13 this statute.

14 And whether we, you know, call them,
15 you know, component, the agency itself,
16 representative or whatnot, nobody contests that
17 this particular entity is performing those
18 functions and those are the kind of things that
19 are at the heart of collective bargaining.
20 And, as Justice Kagan says, someone has to be
21 across the table if the rights that are being
22 conferred have any power.

23 MS. REAVES: I think that's right,
24 Justice Jackson. And I think all of these
25 things, the component argument, the

1 representative argument, the agency arguments
2 all are trying to fit together these two
3 statutory schemes and the clear right that
4 technicians have in this clear designation of
5 federal authority.

6 JUSTICE KAGAN: So, Ms. Reaves, as --
7 as I understand General Flowers' argument,
8 although I'm not sure I did until this
9 argument, but he says he agrees that these
10 employees have collective bargaining rights, he
11 agrees that that means that somebody has to be
12 across the table, but he says it's you that has
13 to be across the table, the DoD, and, you know,
14 by virtue of the definitional sections.

15 And he says, you know, there's --
16 there's no requirement that you do this
17 nationwide, you can just do it for Ohio.

18 Now I am not sure why Ohio would want
19 you to bargain for them, but apparently Ohio
20 does.

21 (Laughter.)

22 JUSTICE KAGAN: And I guess the
23 question is what would that scheme look like?

24 MS. REAVES: So I do think it's
25 important to think about what that scheme would

1 look like. And, first of all, you know,
2 historically, the FLRA has certified bargaining
3 units not at the nationwide level when it comes
4 to the DoD.

5 And that comes from the definition of
6 "appropriate unit" in 7112(a) of the Act, which
7 is on page 5a of the statutory appendix, that
8 requires the agency to take into account a
9 clear and identifiable community of interest.
10 And, historically, that hasn't meant a
11 nationwide bargaining unit.

12 But setting that aside --

13 JUSTICE KAGAN: Okay. So let's say
14 it's Ohio.

15 MS. REAVES: Yeah. So setting that
16 aside, I think we have to think about the
17 enforcement difficulties here. So what Ohio is
18 proposing is that DoD bargains with state --
19 with state National Guard -- state -- employees
20 of state National Guard units and then, when
21 Ohio refuses to comply with that, instead of
22 the FLRA issuing them an order and it being
23 subject to contempt, as is the ordinary case
24 and has happened for the last nearly 50 years,
25 DoD has to threaten to withhold federal funding

1 or federal recognition to the state National
2 Guard and state Adjutant General.

3 And -- and, respectfully, to my friend
4 on the other side, I don't think that's any way
5 to run a railroad. That has actual
6 implications for the relationship between state
7 national guards and their federal components.
8 There could be real national security risks.

9 And if I can play this out just one
10 more way, I think you further have to imagine
11 how could the FLRA try to enforce that against
12 DoD. Could the FLRA hold DoD in contempt if it
13 doesn't threaten to withhold all of a state
14 National Guard's funding in order to enforce
15 some minor FLRA order involving a single
16 federal employee?

17 I think the system the Court should
18 stick with is the system that's worked for the
19 last 50 years.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 What entity in the federal -- I can't
23 say in the federal government, that's part of
24 the question. I mean, what -- what entity is
25 most like the Adjutant General here?

1 MS. REAVES: I think, for bargaining
2 purposes, what's most --

3 CHIEF JUSTICE ROBERTS: No, just in
4 general. If you said this is the closest
5 analog to the Adjutant General.

6 MS. REAVES: It would probably be the
7 secretary -- whoever in charge of the
8 Department of the Air Force or the Department
9 of the Army.

10 CHIEF JUSTICE ROBERTS: So a full-time
11 federal employee, officer of the United States,
12 head of an agency as defined under law?

13 MS. REAVES: Yes. That would be --

14 CHIEF JUSTICE ROBERTS: Well, that's
15 nothing at all like what they are.

16 MS. REAVES: Well, I think Adjutant
17 Generals are very unique. They're the number
18 one military commander in their state. And
19 so -- and they primarily do act, you know, when
20 they're not called into federal active duty
21 service or when they're not supervising federal
22 civilian employees, they do primarily act in a
23 state role. But they have these other hats.

24 CHIEF JUSTICE ROBERTS: No, no, I
25 know. That's why I'm trying to find if there's

1 anything remotely like them at all.

2 MS. REAVES: I mean, I -- I think the
3 closest thing, if you're talking about the
4 federal system, is the head of federal military
5 departments. That would be the most analogous
6 thing.

7 CHIEF JUSTICE ROBERTS: But how are
8 they remotely like it? I mean, nobody would
9 say, well, let's try to figure out if you're a
10 federal officer or a federal agency. It's
11 pretty clear they are. So you've got nothing
12 that's remotely like them, I gather.

13 MS. REAVES: I -- I don't think so.
14 They are really unique. I mean, I guess
15 something that's analogous are individual
16 members of state national guards. They also
17 have to wear three hats.

18 CHIEF JUSTICE ROBERTS: Yeah, but
19 you'd never call them an agency.

20 MS. REAVES: No, you wouldn't.

21 CHIEF JUSTICE ROBERTS: There's Agency
22 Fred. No.

23 MS. REAVES: Mm-hmm. No, you would
24 not.

25 CHIEF JUSTICE ROBERTS: Okay. Justice

1 Thomas, anything further?

2 JUSTICE THOMAS: No.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Well, if the Adjutant
5 General is like the Secretary of the Army,
6 let's say that there is -- that there are
7 certain Army employees who have the right to
8 bargain collectively.

9 Presumably, the Secretary of Defense
10 could order the Secretary of the Army to engage
11 in that bargaining personally, couldn't --
12 couldn't he?

13 MS. REAVES: So I think, in that
14 situation, and that was what I was trying to
15 get at for what purposes the Chief Justice's
16 question was asking for the comparison.

17 For the purposes of bargaining
18 comparison, you know, DoD civilian employees
19 have bargaining rights. Let's take -- set
20 aside these state -- state dual-status
21 technicians. So just normal federal civilian
22 employees of DoD have bargaining rights.

23 But they usually bargain not with the
24 head of DoD, they bargain because their units
25 are set at lower levels with, like, the entity

1 that controls their base or something along --

2 JUSTICE ALITO: No, they don't
3 normally do it. But is there any reason why
4 the Secretary of Defense couldn't say to the
5 Secretary of the Army, I -- I want you to do
6 it? Or couldn't the President order that?

7 MS. REAVES: So I think two responses
8 to that. First, yes, I think that that could
9 be ordered. But, second, I think, if the
10 bargaining unit is certified at a lower level,
11 which is what matters for the purposes of
12 bargaining before the FLRA, you know, that
13 person wouldn't be the appropriate person to be
14 engaging in bargaining, but, of course, the
15 President could, you know, order that person to
16 actually go and engage.

17 JUSTICE ALITO: Well, what I'm getting
18 at is, if the Adjutant General is really a
19 component of the Department of Defense, are
20 there any limits on what the -- what the
21 Secretary of Defense could order the Adjutant
22 General to do in relation to collective
23 bargaining?

24 MS. REAVES: So I -- I -- I don't
25 think we've identified any limits. I think

1 there are enforcement limits. You know, if DoD
2 were to instruct the Adjutant General to do
3 something, the enforcement options that DoD
4 would have would be pulling threat -- federal
5 funding or federal recognition.

6 They don't have the option to remove
7 the federal -- the Adjutant General from their
8 state Adjutant General role, although they
9 could remove him from his federal role.

10 JUSTICE ALITO: Yeah, they don't have
11 the -- the authority to order the removal of
12 the Adjutant General. Could the Adjutant
13 General be ordered to do what was broached at
14 one point in this case and that is to apologize
15 personally to these employees for violating
16 their rights?

17 MS. REAVES: So I don't think that an
18 order along those linings would be distinct
19 from the other types of orders that we've
20 suggested. You know, if there was a valid
21 basis for that order and that instruction, you
22 know, that instruction could come from DoD, but
23 it would be limited to these enforcement
24 options that DoD has.

25 JUSTICE ALITO: This is a very unusual

1 scheme, and what you're asking for may have
2 implications. Why isn't the best solution to
3 this problem that -- for Congress to step in
4 and specify what is to be done in this
5 situation, this arguably sui generis situation?

6 MS. REAVES: I think Congress already
7 has said what it meant here, and I think the
8 savings clause is one indication of that.
9 Fifty years of uninterrupted collective
10 bargaining, I mean, seven circuits have come
11 out this way, and Congress has amended the
12 Technicians Act multiple times in those 50
13 years.

14 And I think there's every reason to
15 believe that as long as Petitioners accept the
16 benefits of dual-status technicians, which are
17 free federal employees doing their day-to-day
18 work, they have to accept the obligations that
19 come along with that and have come along with
20 it for the last 50 years.

21 JUSTICE ALITO: Do you think that the
22 savings clause represents congressional
23 adoption of every administrative decision like
24 the Thompson Field decision that was issued
25 prior to that point?

1 MS. REAVES: I think it does indicate
2 adoption of a precedential decision
3 interpreting terms that are the same under the
4 executive orders and the same under the Act,
5 and that's what the Thompson Field decision is.

6 JUSTICE ALITO: How many such
7 executive decisions or regulations would be
8 covered by that?

9 MS. REAVES: I'm not sure, Justice
10 Alito. I'm not sure how many precedential
11 decisions there were.

12 JUSTICE ALITO: Well, would it be a
13 large number?

14 MS. REAVES: I think it would be at
15 least in the hundreds.

16 JUSTICE ALITO: And you think Congress
17 surveyed all of those and said we want to -- we
18 want to freeze all of those?

19 MS. REAVES: I don't know what
20 Congress was thinking, but I do know what
21 Congress said in the text, and it was that such
22 decisions would survive the Act's adoption.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Well, Congress did

1 have its attention drawn to the collective
2 bargaining aspects of this when they were
3 creating the carveout for the -- correct?

4 MS. REAVES: That's correct, yes.
5 When Congress enacted Section 976, it was
6 explicitly thinking about technician service.

7 JUSTICE SOTOMAYOR: And it knew
8 because it was told by the national guards that
9 they were required to collectively bargain and
10 also to submit to federal agency supervision of
11 that process, correct?

12 MS. REAVES: Yes, that's correct.

13 JUSTICE SOTOMAYOR: And they wanted
14 out of it and they didn't get it, correct?

15 MS. REAVES: That's correct, Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?
19 Justice Gorsuch?

20 JUSTICE KAVANAUGH: Of what
21 significance is DoD's approval of the
22 collective bargaining agreement, if any?

23 MS. REAVES: DoD's approval does
24 indicate and confirm that DoD is the relevant
25 agency for these purposes. I think it's also

1 helpful because it does indicate that to the
2 extent there are some sort of concerns that
3 bargaining might be touching on military
4 matters in violation of Section 976, DoD can
5 reject the bargaining agreement outright.

6 So some of the concerns that
7 Petitioners are raising about DoD being the
8 right entity to deal with this can be done by
9 DoD's review process.

10 And I think the third relevance that
11 that provision has is that it's yet another
12 indication that it's often not the high-level
13 agency or the entity at the very top of the
14 agency who's responsible for the collective
15 bargaining relationship and complying with the
16 FLRA on a day-to-day basis.

17 JUSTICE KAVANAUGH: On Justice
18 Gorsuch's questions about hypothetical schemes
19 that would be similar in some respects to this,
20 and I think he asked about would there be any
21 constitutional limits, I guess I would have
22 thought there might be, but they're not at
23 issue here and we don't have any constitutional
24 issues in this case.

25 MS. REAVES: I -- I certainly agree

1 with that, Justice Kavanaugh. And I took
2 Justice Gorsuch's question to be a
3 hypothetical. It's obviously not at issue in
4 this case. And I think, you know, to the
5 extent that some of the amici have raised
6 commandeering problems, you know, Petitioners
7 have consented, that's very clear. And the
8 second thing is Petitioners are not
9 administering a federal regulatory scheme.
10 Petitioners are just complying with the federal
11 law.

12 JUSTICE KAVANAUGH: Then two more.
13 Third, on the role of the states, once Congress
14 decides that these technicians are going to
15 have collective bargaining rights, it seems to
16 me more friendly to the state at that juncture
17 to have them collectively bargain than to have
18 the Assistant Secretary of Defense for
19 Collective Bargaining, hypothetically,
20 collectively bargain and force the state to
21 comply with certain conditions without the
22 state sitting across the table?

23 MS. REAVES: I very much agree with
24 that, Justice Kavanaugh. I think that not only
25 is it no way to run a railroad to have DoD

1 threaten to pull federal funding or federal
2 recognition to enforce this, it's also not ---
3 they're also not the ideal party because they
4 don't supervise dual-status technicians on a
5 day-to-day basis and they don't hire or fire
6 them on a --

7 JUSTICE KAVANAUGH: Do you know --

8 MS. REAVES: -- regular basis.

9 JUSTICE KAVANAUGH: -- if Congress was
10 -- anyone in Congress actually said anything
11 like that? If you don't, that's fine. Yeah,
12 that's fine.

13 MS. REAVES: Yeah, I don't think
14 anything that Congress --

15 JUSTICE KAVANAUGH: They did consider
16 the collective bargaining issue, though,
17 because that was -- that was raised as a
18 concern by the state units or the state guard
19 units in the '70s, as I understand, right?

20 MS. REAVES: That's correct. When 976
21 was adopted, which was about a year from when
22 the Reform Act itself was adopted, Congress
23 really focused in on the technician issue
24 itself.

25 And there was initially legislation

1 proposed that would have said that technician
2 service is like active duty military service
3 and you can't bargain over it.

4 And members of the military came
5 before Congress and raised concerns that that
6 would hurt relations between technicians and
7 their immediate supervisors, and also raised
8 concerns that would hurt military preparedness.
9 And Congress just explicitly rejected that with
10 the text of Section 976, which doesn't carve --
11 doesn't include technician service within the
12 barred service.

13 JUSTICE KAVANAUGH: One -- last one.
14 I'm not aware of states coming to Congress to
15 seek a change to this scheme recently, but you
16 would know more than I about that.

17 MS. REAVES: That's correct. There
18 haven't -- hasn't been anything recent. There
19 was a cert petition, Lipscomb, that was filed,
20 I believe, about a decade ago, where a state
21 raised this argument and the Court denied that
22 cert petition.

23 JUSTICE KAVANAUGH: I meant to
24 Congress.

25 MS. REAVES: Oh, to Congress, I'm

1 sorry. I'm not aware of states raising this
2 with Congress, no.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Ohio says that it
7 would be impractical and even unlawful for it
8 to comply with the collective bargaining order
9 issued in this case and presumably in others as
10 well and you dispute that.

11 Would you characterize it as an open
12 question on which you have the better of the
13 argument, but there's a risk that Ohio would be
14 right or do you think Ohio is just crazy to say
15 it?

16 MS. REAVES: I think the latter.

17 JUSTICE BARRETT: With all respect to
18 General Flowers.

19 (Laughter.)

20 MS. REAVES: I think the latter,
21 Justice Barrett. I think the Sixth Circuit was
22 correct. What I take Petitioners to be
23 complaining about is the portion of the order
24 requiring them to reinstate union dues
25 withholding.

1 And what happened is that, although
2 DoD may be responsible for the withholding, the
3 Petitioners are responsible for having on hand
4 and filing the forms necessary for that. So
5 what Petitioners did in this case is they filed
6 forms canceling dues withholding on behalf of
7 dual-status technicians. They signed those
8 forms.

9 And that was something that was not
10 permitted under the relevant statutes and
11 regulatory provisions.

12 So I think it's fair that the Sixth
13 Circuit said, to the extent that Ohio took that
14 action, which may -- was outside the law, that
15 they can be required to correct that action.

16 And I think in any event, though, it's
17 really a side show in this case, because
18 Petitioners haven't in any way suggested that
19 they are unable to comply with the remainder of
20 the FLRA's orders.

21 And so to the extent there is some
22 minor thing that on the facts of this case you
23 might think are problematic, doesn't in any way
24 undermine that generally there aren't a problem
25 with FLRA orders.

1 JUSTICE BARRETT: Well, I mean, I
2 guess the reason why I ask is that you have
3 pointed out the real practical problems that
4 would arise if DoD was the one sitting on the
5 other side of the bargaining table. And Ohio
6 says: Well, wait, wait, wait, there are real
7 practical problems and legal problems that
8 arise if we're the ones sitting on the
9 bargaining table because then the FLRA issues
10 orders that we actually can't carry out.

11 And even if the Sixth Circuit was
12 right about the order in this case on that
13 particular issue, can you imagine other things?
14 I mean, is Ohio right that there would be a
15 practical problem whichever way you go, because
16 there might be a number of things that are
17 controlled by DoD regulations that the Ohio
18 Adjutant General just can't control?

19 MS. REAVES: I'm not aware of
20 anything. And I actually think the onus is on
21 Ohio here because we've spent 50 years
22 collectively bargaining. And there are many
23 Court of Appeals and FLRA decisions about this.

24 Ohio hasn't been able to identify any
25 difficulties or any sorts of things that they

1 couldn't comply with in any of those other
2 orders.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: So I just -- I think
6 I don't really see the federalism or
7 commandeering concern. And I'm -- I'm worried
8 that it's because maybe I don't understand what
9 it is that Adjutant Generals do or what the
10 federal law is requiring.

11 I -- I thought that by virtue of this,
12 they weren't subjecting themselves to federal
13 authority for all purposes in that it wasn't
14 that they were converting themselves into an
15 agency sort of writ large in general, and so
16 all of the things that apply to agencies in the
17 federal law somehow attach.

18 I thought that the Adjutant Generals
19 are only subject to the FLRA's authority when
20 they're acting with that hat on; that is, the
21 capacity to be the employer of this group of
22 federal employees. Am I right? Isn't there
23 sort of like really a limited scope of FLRA
24 authority being exerted here?

25 If -- if they're hiring state people

1 or if they're supervising state people, the
2 FLRA is not involved. It's just when this
3 group of federal employees that everybody
4 concedes are there are being supervised by this
5 state officer must the state officer comply
6 with the Federal Labor Relations Authority
7 about collective bargaining? Am I right about
8 that?

9 MS. REAVES: That is absolutely
10 correct, Justice Jackson. The state Adjutants
11 Generals don't have to collectively bargain
12 over their federal or state military service of
13 dual-status technicians. And they also don't
14 have to bargain over anything that implicates
15 or potentially implicates that from dual-status
16 technicians civilian federal service. That
17 comes from 709(f). So you're completely right.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Grajales.

22 ORAL ARGUMENT OF ANDRES M. GRAJALES

23 ON BEHALF OF THE UNION RESPONDENT

24 MR. GRAJALES: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 A ruling in favor of the union here is
2 not going to affect any other aspect of the
3 Petitioners, nor is it going to affect any
4 other state entity. The scheme is completely
5 unique for both technicians but also for the
6 National Guard.

7 And the authority for that is set
8 forth in the militia clauses themselves and in
9 the Technicians Act. And those are where we
10 also find the limits on that authority.

11 Ultimately, this is a policy
12 disagreement that Ohio can take to Congress,
13 but Congress as it stands today understood the
14 matter to be settled. They understood Adjutant
15 General and the state National Guards to be
16 covered. And that is the Thompson Field
17 decision, which was a definitive decision, the
18 very first question that was answered in that
19 case was whether the order in that case could
20 be applied to the Adjutant General and the
21 state National Guard.

22 And we then have to look at the
23 context, which is what 7135 requires to see
24 that that carried forward to the FLRA. And I
25 just want to get into one more thing, which is

1 Petitioners now concede, A, that the civilian
2 technicians are federal employees, B, that they
3 have bargaining rights and, C, that the FLRA
4 could certify units on a regional basis, which
5 is what the FLRA has done, in essence, using
6 its authority under 7112 of the statute.

7 And they also fight against, they say
8 they can do that, but they can't redress
9 bargaining obligations, that has to be DoD.
10 But really what they're saying is it's now just
11 a question of degree.

12 And that bargaining at DoD doesn't
13 work for the reasons you've heard already, but
14 it's inconsistent with the statutory scheme.

15 And the one thing I want to point out
16 is if bargaining were moved to DoD, it would
17 render parts of the statute inoperative. Under
18 709(d) and 709(e) and 709(f), the Technicians
19 Act gives day-to-day supervision over working
20 conditions and conditions of employment to the
21 Ohio Adjutant General.

22 Under 7121 of the statute, a
23 negotiated agreements procedure must have
24 arbitration. And that arbitration must be
25 binding. If we go to -- if the union goes to

1 arbitration with DoD, but DoD can't issue an
2 order to the Adjutant General, that arbitration
3 becomes advisory and that is inconsistent with
4 the statute.

5 And I'd be happy to take any
6 questions.

7 CHIEF JUSTICE ROBERTS: Well, you say
8 it becomes advisory, but as -- what is the
9 limit under -- under your theory as to what the
10 Department of Defense can order the state
11 National Guard to do?

12 MR. GRAJALES: Well, the outer limit
13 is unclear, but what we can say is that if they
14 can't -- under 709(f) and 709(d), the Adjutant
15 General has authority to suspend, to discharge,
16 to do any number of things that directly affect
17 technicians' civilian aspects of employment.
18 If the statute leaves that to the Adjutant
19 General, then that poses a problem with the
20 authority of DoD to issue an order.

21 And if we go to arbitration with DoD,
22 we say we -- say the union gets a favorable
23 arbitration award on a suspension, and an
24 arbitrator says that five-day suspension that
25 was based on a civilian incident should be

1 overturned and should be rescinded and taken
2 out of a technician's record.

3 CHIEF JUSTICE ROBERTS: Well, I guess
4 what concerns -- and maybe my perception of it
5 is wrong, but my concern, the Adjutant General
6 is being treated as an agency, the idea is you
7 can't be treated as half an agency, and if
8 they're treated as all an agency, their
9 character as a state entity is essentially
10 gone.

11 MR. GRAJALES: We would not agree with
12 that. This is a very unique and very limited
13 scenario where they're acting as a federal
14 actor. They're wielding federal power.
15 They're supervising federal employees. So
16 they're not acting with their state hat on.

17 JUSTICE SOTOMAYOR: So --

18 JUSTICE GORSUCH: Oh, I'm sorry.

19 JUSTICE SOTOMAYOR: Thank you. I --
20 I'm trying to look at what the -- the Board did
21 below and what the state agency, Guard, was
22 arguing. Below, I'm not sure why they're
23 collecting the forms that say deduct my union
24 dues. Because I thought it was the federal
25 government who paid the dual citizens' salary.

1 MR. GRAJALES: So that just
2 strengthens our argument that the scheme as it
3 stands today, it ain't broke. What it
4 demonstrates is how the Technicians Act
5 operates in conformity -- or how the statute
6 operates in conformity with the Technicians
7 Act. And how it works in practice is those
8 forms are given to the Guard and then they are
9 processed, and then the dues are -- through DoD
10 and the dues are with -- actually withheld in
11 a --

12 JUSTICE SOTOMAYOR: By DoD?

13 MR. GRAJALES: By DoD.

14 JUSTICE SOTOMAYOR: But the only thing
15 is that the Guard collects the form for the
16 government?

17 MR. GRAJALES: That has always been
18 the case. And -- and to that point --

19 JUSTICE SOTOMAYOR: All right. Now --

20 MR. GRAJALES: -- we don't agree with
21 their --

22 JUSTICE SOTOMAYOR: -- they also
23 tried, from what I understand -- they'd
24 probably take umbrage at me calling this --
25 they tried to union-bust because they said they

1 were no longer going to collectively bargain
2 over certain terms of employment, correct?

3 MR. GRAJALES: That's correct.

4 JUSTICE SOTOMAYOR: And what the
5 agency then said is, uh-uh, that's part of
6 collective bargaining. Those are terms that
7 have to be, were, and should continue to be
8 collectively bargained, correct?

9 MR. GRAJALES: That's -- yeah --

10 JUSTICE SOTOMAYOR: Merit
11 promotions --

12 MR. GRAJALES: As I understand the
13 question, what they repudiated the FLRA found
14 they were required to bargain over, and they
15 were required to abide by mandatory terms of
16 the collective bargaining agreement.

17 JUSTICE SOTOMAYOR: So they were
18 basically saying to the Department of the Army,
19 yes, we're giving you the opportunity to hire
20 our employees, but you have to collectively
21 bargain with them. And they were saying, eh, I
22 don't really want to, so I won't.

23 MR. GRAJALES: Well --

24 JUSTICE SOTOMAYOR: I'm going to keep
25 them. I'm going to employ them. I'm not going

1 to pay them. But I'm not going to do what I
2 promised to do when I took them. I'm not going
3 to collectively bargain with them.

4 MR. GRAJALES: Yes, and that's a
5 function of the designation, again, to go back
6 to that. That's the answer here, is the
7 Technicians Act. The Technicians Act creates a
8 split scheme, and it's part of the National
9 Guard. And that was the choice that Congress
10 made when it made these employees federal
11 civilian employees. And Congress certainly
12 knew that they were bargaining with Adjutant
13 Generals. It's in the record. I mean, that --
14 Thompson Field is in and of itself unique in
15 that it was entered into the congressional
16 record. So we don't really need to look to
17 other decisions or other terms to determine
18 what Congress intended here.

19 JUSTICE GORSUCH: Counsel, though --

20 JUSTICE SOTOMAYOR: Sorry. Entered
21 into the record -- I'm sorry.

22 JUSTICE GORSUCH: No, please.

23 JUSTICE SOTOMAYOR: Just entered into
24 the record when?

25 MR. GRAJALES: The congressional --

1 the Thompson Field decision was entered into
2 the congressional record when Congress was
3 considering and debating the ban on military
4 unions in 1976. It was deliberately put into
5 the record. And there's a great deal of
6 testimony, which we refer to in our brief,
7 where not only is the Guard or representatives
8 of the Guard complaining and asking to be
9 relieved of their bargaining obligations under
10 the executive order, union representatives are
11 also explaining to Congress how that bargaining
12 scheme works. And --

13 JUSTICE GORSUCH: Counsel, I'm sorry
14 to interrupt, but I just want to make sure I
15 understand your -- your argument both -- to
16 both of my colleagues here.

17 So the Adjutant General of Ohio is a
18 federal agency to the extent -- sometimes, to
19 the extent that he's dealing with dual-status
20 technicians in their civilian capacity?

21 MR. GRAJALES: That is our argument.
22 However, I would limit it even further, which
23 is --

24 JUSTICE GORSUCH: But he's not -- he's
25 not a federal agency for other purposes?

1 MR. GRAJALES: Right. Only for this
2 limited -- limited purpose of dealing with the
3 civilian aspects of technicians' employment.

4 JUSTICE GORSUCH: Okay.

5 MR. GRAJALES: And that is --

6 JUSTICE GORSUCH: Now, when I turn to
7 those definitions in Section 105 -- 5 U.S.C.
8 105, I think, is what you -- you pointed to, I
9 don't see that -- that kind of distinction that
10 he's -- that there can be agent -- executive
11 agency sometimes, that they're evanescent, that
12 they are -- they occasionally pop up and then
13 they disappear.

14 And the other thing I don't see is --
15 in the definition of 105, it speaks of the
16 executive departments from 101, but it -- it
17 doesn't mention 102, which are the military
18 departments. What do we do about that?

19 MS. REAVES: Well, the military
20 departments, I don't -- we don't believe that's
21 a question here -- are by their own -- I think
22 it's 10 U.S.C. 111 --

23 JUSTICE GORSUCH: Yeah, 10 --

24 MR. GRAJALES: -- think that they are
25 --

1 JUSTICE GORSUCH: -- 10 U.S.C.

2 suggests they are, but --

3 MR. GRAJALES: It says that they are.

4 JUSTICE GORSUCH: Yeah. Right. And
5 105 says they are in -- in 5 U.S.C. So what do
6 I do about that?

7 MR. GRAJALES: You have to read those
8 together. I don't -- we don't agree that 105
9 says they are not. They are --

10 JUSTICE GORSUCH: No, it leaves that
11 impression, though, because it includes 101,
12 103, 104, but it doesn't include 102, right?

13 MR. GRAJALES: But it includes the
14 Department of Defense --

15 JUSTICE GORSUCH: Right, but it
16 doesn't --

17 MR. GRAJALES: -- which is an
18 executive department, and --

19 JUSTICE GORSUCH: In 101. But the
20 military departments in 102 are not included.
21 I see the tension. I do. And I see your point
22 that 10 U.S.C. should control over 5 U.S.C.
23 I'm just wondering why.

24 MR. GRAJALES: Because it's the only
25 way that it makes sense, is if you read those

1 statutes together, Congress intended for the
2 Department of Defense to be composed of
3 Department of the Army and the Department of
4 the Air Force --

5 JUSTICE GORSUCH: All right.

6 MR. GRAJALES: -- and which they
7 become agencies through that -- through that
8 mechanism.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 Justice Gorsuch, anything further?

14 No?

15 Justice Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: Aren't -- just in
18 response quickly to Justice Gorsuch's point
19 with respect to 101 and 102, I thought that
20 what was happening there was -- was the fact
21 that the Arm -- the Departments of Air Force
22 and Army used to be outside of DoD, Congress
23 brought them in, and then arrangements were
24 made to make clear that they were now inside
25 DoD, the military departments are a part of DoD

1 right now.

2 And there may be other statutes in
3 which they are referenced separately, which is
4 why you have 102, but --

5 MR. GRAJALES: I confess and I
6 apologize that --

7 JUSTICE JACKSON: Yes.

8 MR. GRAJALES: -- I don't know the
9 history --

10 JUSTICE JACKSON: I see.

11 MR. GRAJALES: -- but I agree with the
12 conclusion that that is what they did.

13 JUSTICE JACKSON: Yes. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MR. GRAJALES: Thank you.

17 CHIEF JUSTICE ROBERTS: Rebuttal,
18 General Flowers?

19 REBUTTAL ARGUMENT OF BENJAMIN M. FLOWERS

20 ON BEHALF OF THE PETITIONERS

21 MR. FLOWERS: Thank you, Mr. Chief
22 Justice. I have just one quick point and then
23 two larger points.

24 The quick point responds to Justice
25 Alito's question about the single decision and

1 what do we make of that. This Court in
2 Department of Interior v. FLRA looked at one of
3 those decisions by the Assistant Secretary, and
4 it said, basically, one decision is worth
5 virtually nothing. That's 526 U.S. at page 95.

6 Now for the two bigger points. The
7 first and the most fundamental is that I think
8 what this argument shows, what the briefing
9 shows, is that the only way you get the
10 Petitioners into the definitions here is to
11 fight the text. There's just no way to get
12 there.

13 Now the Authority says you look to
14 709(d) and we're designees. That's true, but
15 why does it matter. Why does a designee become
16 an agency under Title V? And let's also keep
17 in mind that the relevant definitions here, the
18 Title V definitions, are not part of the Reform
19 Act. The Reform Act incorporates them, but the
20 Title V definitions apply throughout Title V.

21 So there were questions about
22 consequences. Think of the other entities that
23 might qualify as agencies under their theory.
24 This Court in Maryland v. United States said
25 that state militias, even though they care for

1 equipment on behalf of the government, do not
2 thereby become the federal government. I think
3 that may go out the window.

4 What do we do with federal employees
5 who are all agents of the federal government?
6 Are they now federal agencies for purposes of
7 Title V? What about the state actors who run
8 our employment systems as agents of the federal
9 government? Are they now federal agencies for
10 purposes of Title V? I can't see why the
11 answer would be no.

12 So, other than just an ad hoc decision
13 that's good for this particular context and
14 this particular case, there's just no way to
15 read us into the Act.

16 And that brings me to my second good
17 point. There's no reason to fight the text so
18 hard. The Defense Department can handle this,
19 and it's, in fact, better positioned to handle
20 this. First, they have control over many of
21 the issues with respect to which the
22 technicians may wish to bargain and with
23 respect to which the Authority may wish to --
24 to -- to make orders.

25 I think there was a suggestion that we

1 might be crazy for saying that we would violate
2 the law by -- by reinstating dues. I might be
3 crazy but not for that reason. We would have
4 to break into the federal computer system and
5 reinstate the dues ourselves because we do not
6 actually withhold the dues. The federal
7 government does.

8 In addition to the control they have,
9 there's no reason to think we're going to spar
10 with the Department of Defense. That's just
11 not the way it goes. We do follow National
12 Bureau -- Bureau regulations, but then you
13 might ask -- I think Justice Kavanaugh asked
14 us -- well, why does Ohio care then, why are
15 you here?

16 Well, here's my answer is that when we
17 worked through the Department of Defense or
18 when the Authority has to go against the
19 Department of Defense, we have the Defense
20 Department and the President as Commander in
21 Chief as a buffer.

22 And if they see what's going on and
23 say, no, if you order that, it's going to
24 interfere with the military interest of the
25 United States, A, the FLRA is probably going to

1 take that seriously when deciding what to --
2 what to order or what to request and, B, if
3 somehow the Authority does order the President
4 to do something that is contrary to military
5 interests, there may well be a situation where
6 the President's in court saying you cannot
7 command us to do that. You cannot make us
8 withhold all the federal recognition or funding
9 from the state guards.

10 So if there are no further questions,
11 we simply ask that you reverse the Sixth
12 Circuit.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 12:42 p.m., the case
16 was submitted.)

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Official - Subject to Final Review

<p>1</p> <p>10 [4] 99:22,23 100:1,22 101 [4] 99:16 100:11,19 101:19 10105 [1] 67:3 102 [6] 3:13 99:17 100:12,20 101:19 102:4 103 [1] 100:12 104 [1] 100:12 105 [6] 66:9 99:7,8,15 100:5,8 11:13 [2] 1:17 4:2 111 [1] 99:22 12:42 [1] 106:15 1454 [1] 20:4 15 [1] 4:22 19 [1] 12:5 1971 [1] 12:5</p> <hr/> <p>2</p> <p>2016 [1] 12:5 2023 [1] 1:13 21-1454 [1] 4:4 2105 [1] 56:3 28 [1] 49:25</p> <hr/> <p>3</p> <p>30 [1] 61:1 32 [3] 6:15 8:4 55:24 3a [2] 59:9,17</p> <hr/> <p>4</p> <p>4 [1] 3:4 40 [2] 5:17 61:1</p> <hr/> <p>5</p> <p>5 [3] 99:7 100:5,22 50 [6] 56:20 72:24 73:19 79:12,20 88:21 526 [1] 103:5 55 [1] 3:7 5a [2] 59:9 72:7</p> <hr/> <p>6</p> <p>65 [1] 45:17</p> <hr/> <p>7</p> <p>709 [1] 6:15 709(d) [8] 55:24 58:5 60:14 62:15 66:17 92:18 93:14 103:14 709(e) [5] 8:4 41:3 58:5 66:17 92:18 709(f) [3] 90:17 92:18 93:14 70s [4] 33:7 48:21,23 84:19 7103(b) [1] 68:17 7112 [1] 92:6 7112(a) [1] 72:6 7121 [1] 92:22 7135 [4] 19:13 20:6 36:16 91:23</p> <hr/> <p>8</p> <p>855 [1] 20:4</p> <hr/> <p>9</p> <p>9 [2] 1:13 50:1 90 [1] 3:10 95 [1] 103:5 976 [5] 81:5 82:4 84:20 85:10 98:4</p>	<p>A</p> <p>a.m [2] 1:17 4:2 abide [1] 96:15 ability [3] 55:2 64:19 66:3 able [4] 17:7 58:9 62:16 88:24 above-entitled [1] 1:15 Absolutely [5] 39:1 42:21 47:6 63:4 90:9 accept [5] 57:11,12 59:20 79:15,18 accepted [1] 56:19 account [2] 52:13 72:8 acknowledge [5] 11:14,15,23 25:8 44:22 acquire [2] 43:11 48:20 across [11] 13:9 25:18 26:4,13 32:13 54:7,18 70:21 71:12,13 83:22 Act [61] 4:17 5:6,7,9,17 11:12 13:19,24 14:18 16:20 17:12 18:16 19:16,18,25 20:16,19 21:22 22:10,16 23:25 24:20 36:17,19 40:14 41:4,7 47:3 49:12 50:13 51:6 55:17 56:12,12,14,24 57:3 58:1 59:1,22 68:9,16,17,19,21 69:13 72:6 74:19,22 79:12 80:4 84:22 91:9 92:19 95:4,7 97:7,7 103:19,19 104:15 Act's [2] 67:22 80:22 acting [21] 8:16 12:13 15:9 18:24 25:12,14,15 32:9,21 36:8 44:6 51:22 53:8 54:14 56:8 58:12 67:11,13 89:20 94:13,16 action [2] 87:14,15 actions [2] 43:25 53:5 active [3] 63:16 74:20 85:2 activities [3] 26:20 58:11 68:1 activity [2] 45:13 53:19 actor [1] 94:14 actors [2] 29:6 104:7 actual [2] 59:2 73:5 actually [14] 10:22 28:23 40:13 48:5 51:7 57:3 64:23 68:20 77:16 84:10 88:10,20 95:10 105:6 ad [1] 104:12 addition [1] 105:8 address [1] 8:18 adhere [1] 20:3 adjudicate [1] 42:18 ADJUTANT [41] 1:3 4:5 6:14,17 7:17,19 11:8 12:17 16:9 23:7 41:25 44:13 45:4 50:8 56:4 64:5 69:21 73:2,25 74:5,16 76:4 77:18,21 78:2,7,8,12,12 88:18 89:9,18 91:14,20 92:21 93:2,14,18 94:5 97:12 98:17 Adjutants [10] 4:13,20 5:4 10:6 27:15 43:1 56:6,22 70:3 90:10 administer [4] 11:9 40:8 50:3 55:25 administering [2] 52:23 83:9 administrative [3] 18:4 41:16 79:23 adopt [1] 66:12 adopted [2] 84:21,22</p>	<p>adoption [3] 79:23 80:2,22 advance [1] 5:22 adverse [2] 43:11 48:20 advisory [2] 93:3,8 affairs [1] 42:12 affect [3] 91:2,3 93:16 agencies [30] 4:15,18,23 5:10 20:23 22:4,7 23:5 24:2,10 32:5 43:11 46:3 48:19 49:3 55:8 58:16,18 60:1,6,7 61:7 62:23 64:9 68:19 89:16 101:7 103:23 104:6,9 agency [99] 5:7,14,25 8:8,10,12 11:14 14:6,8,10,11 16:14,18 17:11,13 18:1,19 19:19 20:11,19 21:14,18,22,25 22:2,14,15 23:12,19 24:11 25:2 29:23,24 30:23 32:3 35:25 36:13 37:6 38:2,4 39:7,8 42:19,23 43:4,9,13 44:10 48:6,8 51:20 52:6,13,16,20,25 54:24 55:1,4,23 56:9 57:20,23 58:1,2,13,21 59:3,11,12,16,21 61:19,21 66:9,12 67:24 68:18 70:15 71:1 72:8 74:12 75:10,19,21 81:10,25 82:13,14 89:15 94:6,7,8,21 96:5 98:18,25 99:11 103:16 agency's [4] 34:15 44:12 56:14 67:24 agent [24] 8:13,14 12:25 16:4,13 18:25 19:8,10,11 23:25 27:10 32:18 44:4,5 50:9 53:5,5,6,8,19 54:14 55:5,7 99:10 agent's [1] 45:15 agents [11] 5:13 43:25 44:2,12 45:18,20,20 58:18 61:5 104:5,8 ago [2] 20:6 85:20 agree [13] 32:4 33:5 34:7 35:15 40:22 48:21 52:17 82:25 83:23 94:11 95:20 100:8 102:11 agreed [2] 53:20 64:16 agreement [7] 32:25 36:12 47:21 48:15 81:22 82:5 96:16 agreements [2] 48:3 92:23 agrees [4] 23:20 52:19 71:9,11 ain't [3] 41:11 42:8 95:3 Air [6] 11:19 32:5 48:9 74:8 101:4,21 AL [2] 1:4,8 Alito [16] 41:8 68:2,4 69:10 76:3,4 77:2,17 78:10,25 79:21 80:6,10,12,16 101:12 Alito's [1] 102:25 ALJ [1] 47:8 allow [1] 61:16 already [2] 79:6 92:13 alternatively [1] 22:17 although [3] 71:8 78:8 87:1 ambiguous [1] 48:6 amended [1] 79:11 American [1] 66:23 amicably [1] 10:1 amici [6] 5:22 19:1 24:22 66:23 67:16 83:5 among [1] 4:22 analog [2] 66:19 74:5</p>	<p>analogous [3] 58:4 75:5,15 analysis [1] 51:21 analyze [3] 67:16,17,17 ANDRES [3] 2:7 3:9 90:22 angle [1] 33:2 another [4] 22:3 29:20 48:10 82:11 answer [7] 35:12 39:2,3,17 97:6 104:11 105:16 answered [2] 35:5 91:18 answering [1] 15:1 answers [2] 18:6 39:6 anticommandeering [1] 65:17 anybody [2] 34:24 45:10 Anytime [2] 43:4,8 anyway [1] 5:5 apologize [4] 39:24 47:3 78:14 102:6 apparently [1] 71:19 Appeals [1] 88:23 APPEARANCES [1] 2:1 appears [1] 8:24 appendix [3] 59:9,17 72:7 applicable [4] 13:20 14:4 17:12 29:24 applied [1] 91:20 apply [4] 14:4 19:15 89:16 103:20 appoints [1] 56:4 appreciate [3] 37:25 38:1 47:11 appropriate [3] 59:8 72:6 77:13 approval [2] 81:21,23 approve [2] 48:7,12 approved [4] 36:9 47:22 48:3,13 arbitration [6] 92:24,24 93:1,2,21,23 arbitrator [1] 93:24 area [1] 45:19 areas [1] 61:15 aren't [10] 10:4 51:17,18 52:25 59:5,25 60:7 67:13 87:24 101:17 arguably [1] 79:5 argue [2] 37:7 46:1 argues [1] 19:1 arguing [2] 34:20 94:22 argument [37] 1:16 3:2,5,8,11 4:4,8 7:23 19:5,8 30:10 39:9 46:2,5 50:19 55:12 56:23 57:17 66:16,22 67:3,9 69:8,20 70:11,25 71:1,7,9 85:21 86:13 90:22 95:2 98:15,21 102:19 103:8 arguments [7] 5:20,22 18:2,9 56:20 66:22 71:1 arise [3] 28:11 88:4,8 Arm [1] 101:21 Army [12] 32:5 34:23 48:9 67:5 74:9 76:5,7,10 77:5 96:18 101:3,22 arrangement [1] 20:9 arrangements [1] 101:23 Article [1] 41:19 ascertain [1] 20:14 ascribe [1] 43:24 aside [3] 72:12,16 76:20 aspect [1] 91:2 aspects [7] 26:22 28:11 29:16 46:</p>
--	--	--	---

Official - Subject to Final Review

<p>18 81:2 93:17 99:3 assigned ^[1] 32:22 Assistant ^[4] 2:4 37:4 83:18 103:3 assume ^[2] 48:8 60:8 attach ^[1] 89:17 attention ^[2] 34:13 81:1 AUTHORITY ^[58] 1:7 4:6,13,16 5:3,10,19,20,24 6:17 7:9 9:21 10:2,22 14:7,17 15:6,13,24 18:15 20:1 24:23 26:16 28:21 31:2 34:2 39:8 40:6,24 42:23 43:9 44:6 45:22 48:20 55:1 56:1 57:5,18 58:19 60:15 61:11 62:2 67:25 71:5 78:11 89:13,19,24 90:6 91:7,10 92:6 93:15,20 103:13 104:23 105:18 106:3 Authority's ^[2] 5:16,20 authorize ^[2] 15:4 40:7 automatically ^[1] 21:21 award ^[1] 93:23 aware ^[6] 45:19 63:24 65:6 85:14 86:1 88:19 away ^[1] 16:7</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>Babcock ^[2] 63:7 64:1 back ^[18] 9:20 10:17,22 12:19 13:16 19:13 26:7 32:3 35:23 38:1 41:10 42:9 48:21,22 63:19 66:10 69:2 97:5 background ^[1] 38:21 bad ^[1] 50:20 ban ^[1] 98:3 bargain ^[38] 9:8 10:14 12:15 13:10 17:5,9 28:13,14 38:15 40:23 41:1 42:1,14 44:24 46:11,19 53:21 56:17,24 57:4 58:14 59:23 65:20 71:19 76:8,23,24 81:9 83:17,20 85:3 90:11,14 96:1,14,21 97:3 104:22 bargained ^[1] 96:8 bargaining ^[80] 8:6 9:4,6,12 11:21,25 13:7,8 14:20 15:22 22:11 24:16 25:7,19,21 26:13 27:10,11,22 29:1 32:14 33:19 34:21 36:7 38:12,24 47:21 48:3,15 54:7,11,20 55:21 56:21 57:13 59:2,7,10 63:15 64:11 67:19 68:16 69:15,16 70:19 71:10 72:2,11 74:1 76:11,17,19,22 77:10,12,14,23 79:10 81:2,22 82:3,5,15 83:15,19 84:16 86:8 88:5,9,22 90:7 92:3,9,12,16 96:6,16 97:12 98:9,11 bargains ^[4] 17:6 42:2,17 72:18 barred ^[2] 63:14 85:12 BARRETT ^[19] 15:17 16:3,12 35:6 49:24,25 50:18 51:16 61:5 66:11 69:1,19 70:9 86:5,6,17,21 88:1 101:15 base ^[5] 39:22,22 47:1,1 77:1 based ^[1] 93:25 basically ^[8] 27:6 29:13 36:6,6 39:23 42:3 96:18 103:4 basis ^[12] 27:12,25 28:9 29:14 59:11,13 66:1 78:21 82:16 84:5,8 92:4</p>	<p>bear ^[2] 15:15 30:16 become ^[11] 6:14 30:20 45:20 46:3 51:4,10 53:6 55:4 101:7 103:15 104:2 becomes ^[3] 25:17 93:3,8 behalf ^[28] 2:3,6,8 3:4,7,10,13 4:9 5:6 8:16 11:12 12:13,15 15:10 32:21 36:8 40:23 44:7 53:21 55:13 56:8,15 58:1 65:20 87:6 90:23 102:20 104:1 behave ^[1] 56:16 believe ^[7] 21:21 27:16 38:9 40:20 79:15 85:20 99:20 below ^[2] 94:21,22 benefits ^[3] 57:11,14 79:16 BENJAMIN ^[5] 2:2 3:3,12 4:8 102:19 best ^[3] 9:20 51:21 79:2 better ^[4] 16:25 32:16 86:12 104:19 between ^[9] 29:1 52:15 56:21 65:13 69:2,3,5 73:6 85:6 beyond ^[2] 19:23 65:4 big ^[1] 69:20 bigger ^[1] 103:6 bill ^[2] 33:12,13 bind ^[1] 54:11 binding ^[1] 92:25 bird ^[1] 64:2 bit ^[3] 12:22 69:12,18 Board ^[1] 94:20 both ^[5] 56:17 69:25 91:5 98:15,16 bound ^[14] 9:16 15:11 18:5 20:2 28:25 32:25 45:15,18 47:24 53:4,19,24 54:3,8 branch ^[2] 5:2 66:4 breach ^[2] 36:11,14 break ^[1] 105:4 bridge ^[1] 59:4 brief ^[2] 50:1 98:6 briefing ^[1] 103:8 briefly ^[4] 8:17 39:4 40:5 41:2 briefs ^[1] 8:24 bring ^[2] 9:24 30:15 bringing ^[1] 37:8 brings ^[1] 104:16 broached ^[1] 78:13 broad ^[1] 66:12 broader ^[1] 69:12 broadly ^[1] 69:18 broke ^[3] 41:12 42:8 95:3 broken ^[4] 41:13 43:3,4,5 brought ^[1] 101:23 budgets ^[2] 61:1,2 buffer ^[1] 105:21 bunch ^[1] 64:24 Bureau ^[2] 105:12,12</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>cabinet-level ^[1] 4:22 call ^[2] 70:14 75:19 called ^[1] 74:20 calling ^[1] 95:24 came ^[3] 1:15 33:10 85:4</p>	<p>canceling ^[1] 87:6 cannot ^[5] 27:4 35:7 46:15 106:6,7 capacity ^[4] 14:18 39:14 89:21 98:20 captioned ^[1] 7:13 care ^[4] 24:10 30:17 103:25 105:14 cares ^[1] 24:12 caring ^[1] 22:10 carried ^[1] 91:24 carry ^[1] 88:10 carve ^[4] 13:15 22:18,22 85:10 carveout ^[3] 33:9,13 81:3 Case ^[40] 4:4 7:12 11:2 20:5 31:12 36:15 39:21 44:8,12 45:23 46:25 48:12 49:15 52:4 53:20 54:25 60:22 62:9 63:5,12 65:25 67:10,16,21 68:23 72:23 78:14 82:24 83:4 86:9 87:5,17,22 88:12 91:19,19 95:18 104:14 106:14,15 cases ^[6] 10:24 40:10,11 43:18 55:18 61:3 causing ^[1] 66:13 cease ^[1] 64:19 cert ^[2] 85:19,22 certain ^[4] 53:22 76:7 83:21 96:2 certainly ^[5] 12:10 15:7 45:14 82:25 97:11 certified ^[2] 72:2 77:10 certify ^[2] 28:8 92:4 cetera ^[2] 19:14 49:6 chain ^[1] 47:7 challenging ^[1] 31:18 change ^[7] 17:4,11,18 36:20,25 63:17 85:15 changed ^[1] 33:14 changing ^[2] 17:18 19:21 channel ^[1] 47:13 chapter ^[2] 49:7,10 character ^[1] 94:9 characterize ^[1] 86:11 charge ^[5] 10:15 26:24 36:13 42:21 74:7 checks ^[2] 10:9 46:16 CHIEF ^[41] 4:3,10 28:17 29:8,18 30:5,8 39:3 40:2 41:8 43:22 47:15 49:23 51:12 55:9,14 73:20 74:3,10,14,24 75:7,18,21,25 76:3,15 80:23 81:18 86:4 89:3 90:19,24 93:7 94:3 101:9 102:14,17,21 105:21 106:13 choice ^[3] 15:3,5 97:9 circle ^[1] 63:19 Circuit ^[6] 4:12 20:5 86:21 87:13 88:11 106:12 circuits ^[1] 79:10 circumstances ^[1] 28:22 cite ^[1] 53:4 citizens' ^[1] 94:25 civil ^[2] 56:5 63:10 civilian ^[15] 38:13 39:13 55:22 67:11 68:3 74:22 76:18,21 90:16 92:1 93:17,25 97:11 98:20 99:3</p>	<p>claim ^[2] 39:8 62:20 claims ^[1] 5:4 clarification ^[1] 8:23 clause ^[11] 17:15,15 18:8 23:13 48:25 60:24 62:12 63:21 65:18 79:8,22 clauses ^[2] 66:2 91:8 clean ^[1] 18:14 clear ^[8] 50:18 68:22 71:3,4 72:9 75:11 83:7 101:24 clearly ^[2] 18:1 37:15 closest ^[2] 74:4 75:3 code ^[2] 66:19 68:25 colleagues ^[1] 98:16 collecting ^[1] 94:23 collective ^[51] 8:5 9:4,5,12 11:20,25 13:6,7 14:19 15:22 22:11 24:15 25:7,18,20 26:13 27:9,11,22 28:25 32:13 34:21 36:7 38:12,24 47:21 48:2,15 54:10,19 55:21 56:21 59:7 64:11 65:20 67:19 68:16 70:19 71:10 77:22 79:9 81:1,22 82:14 83:15,19 84:16 86:8 90:7 96:6,16 collectively ^[24] 9:8 10:14 12:15 17:5,6,9 28:12,14 40:23 42:14 44:24 53:21 59:23 63:14 76:8 81:9 83:17,20 88:22 90:11 96:1,8,20 97:3 collects ^[1] 95:15 Columbus ^[1] 2:2 come ^[7] 24:21 57:11,13 78:22 79:10,19,19 comes ^[4] 45:13 72:3,5 90:17 coming ^[3] 38:1 42:9 85:14 command ^[2] 47:7 106:7 commandeering ^[2] 83:6 89:7 commandeering-type ^[1] 62:20 commander ^[2] 74:18 105:20 commander-in-chief ^[2] 10:4 39:20 commitments ^[1] 43:7 common ^[2] 52:13 53:2 community ^[1] 72:9 comparison ^[2] 76:16,18 compelling ^[1] 19:6 complaining ^[2] 86:23 98:8 complaint ^[1] 7:7 completely ^[3] 51:2 90:17 91:4 compliance ^[2] 56:13 57:24 comply ^[11] 15:23 55:16 56:18 59:22 68:22 72:21 83:21 86:8 87:19 89:1 90:5 complying ^[2] 82:15 83:10 component ^[23] 18:20,25 19:9 58:13 59:3,5 64:15 66:13,21 67:1,23 68:5,6,11 69:3,6,9,23 70:1,6,15,25 77:19 components ^[6] 56:13 57:25 67:7,9 68:22 73:7 composed ^[1] 101:2 compromising ^[1] 30:21 computer ^[1] 105:4 concede ^[6] 15:21 20:13,17 42:23</p>
---	---	---	--

Official - Subject to Final Review

<p>56:11 92:1 conceded ^[1] 55:3 concedes ^[2] 5:3 90:4 concentral ^[1] 64:23 concept ^[1] 65:4 concern ^[5] 33:15 62:21 84:18 89:7 94:5 concerned ^[1] 30:23 concerns ^[8] 12:22 47:12 63:6 82:2,6 85:5,8 94:4 concessions ^[1] 53:22 conclusion ^[2] 32:18 102:12 conditions ^[5] 13:11 63:15 83:21 92:20,20 conduct ^[1] 10:12 conferred ^[1] 70:22 confess ^[1] 102:5 confirm ^[2] 56:2 81:24 conformity ^[2] 95:5,6 confused ^[1] 8:25 Congress ^[78] 5:23 11:6,10 12:1 13:14 14:21 16:19 20:15,21,22 21:6,22 22:10,17 25:25 26:5,12,14,15 32:23 33:9 34:13 35:13 37:16,16 38:4,10,20 39:15 40:12 42:7,10,11,13,15,21 43:9 44:19 49:4,14 50:12 52:21,22 54:20 59:24 61:14 62:10 64:23 65:13 66:24 79:3,6,11 80:16,20,21,25 81:5 83:13 84:9,10,14,22 85:5,9,14,24,25 86:2 91:12,13 97:9,11,18 98:2,11 101:1,22 Congress' ^[1] 64:8 Congress's ^[1] 63:20 congressional ^[5] 21:7 79:22 97:15,25 98:2 consensus ^[1] 5:18 consent ^[2] 64:15,18 consented ^[2] 64:17 83:7 consequence ^[1] 45:3 consequences ^[2] 50:20 103:22 consider ^[5] 36:22,23 48:7 50:8 84:15 considered ^[2] 37:3 38:22 considering ^[1] 98:3 Constitution ^[1] 65:12 constitutional ^[3] 62:20 82:21,23 constitutionality ^[1] 31:18 contempt ^[2] 72:23 73:12 contests ^[1] 70:16 context ^[11] 20:23 23:24 32:8 33:10 39:16 41:18 52:25 54:19 68:21 91:23 104:13 contexts ^[6] 19:12 40:13 44:3,9 50:2 51:5 continue ^[3] 19:15 20:3 96:7 continued ^[1] 5:21 contract ^[1] 16:17 contractor ^[2] 24:3 53:11 contracts ^[1] 15:11 contrary ^[2] 43:21 106:4 control ^[17] 10:2 14:23 16:21 26:9,22 28:10 29:13 30:25 46:13,18,23 51:3 60:17 88:18 100:22 104:20</p>	<p>105:8 controlled ^[1] 88:17 controls ^[3] 33:5 34:8 77:1 conversely ^[1] 44:1 convert ^[2] 57:20 61:24 converted ^[2] 58:17,21 converting ^[2] 62:22 89:14 cooperation ^[1] 11:1 corporations ^[3] 4:19,24,25 correct ^[28] 14:10,20 31:5,9,19 32:5,6 33:3 43:19 47:22 48:4 65:14,15 67:17 81:3,4,11,12,14,15 84:20 85:17 86:22 87:15 90:10 96:2,3,8 couldn't ^[10] 16:8,9,10 38:16 54:8 76:11,12 77:4,6 89:1 counsel ^[12] 39:22 40:3 46:24 47:8 55:10 73:21 90:20 97:19 98:13 101:10 102:15 106:14 count ^[1] 24:6 counter ^[1] 67:2 couple ^[3] 52:3 62:24 65:23 course ^[5] 28:21 35:11 43:23 57:17 77:14 COURT ^[19] 1:1,16 4:11 17:25 18:1 24:6 35:10 43:18 49:11 55:15 63:6 64:1 73:17 85:21 88:23 90:25 103:1,24 106:6 Court's ^[1] 57:15 courts ^[4] 18:12,15 20:1,2 covered ^[6] 20:16 22:16 51:24 55:23 80:8 91:16 crazy ^[3] 86:14 105:1,3 create ^[2] 16:10 64:25 created ^[1] 54:1 creates ^[1] 97:7 creating ^[1] 81:3 critical ^[1] 46:22 curious ^[4] 60:21 63:3,22 65:10</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:12 2:5,7 dangerous ^[1] 43:12 day-to-day ^[13] 26:20 29:10,14 31:8 58:11,11 60:17 62:4 68:1 79:17 82:16 84:5 92:19 deal ^[2] 82:8 98:5 dealing ^[2] 98:19 99:2 debating ^[1] 98:3 decade ^[1] 85:20 decades ^[4] 18:13 20:5 28:4 41:15 decide ^[1] 21:4 decided ^[1] 57:10 decides ^[1] 83:14 deciding ^[2] 36:13 106:1 decision ^[22] 17:22 19:24,25 36:3,5,6,13,22 48:23 49:9,11 50:11 79:23,24 80:2,5 91:17,17 98:1 102:25 103:4 104:12 decisions ^[11] 17:20,21 18:5 19:14,23 80:7,11,22 88:23 97:17 103:3 deduct ^[1] 94:23 defeat ^[1] 18:8 defend ^[1] 7:20</p>	<p>defendant ^[1] 40:10 Defense ^[66] 5:6 6:7,15 7:4,10,15 9:14 10:8,9,10,11,15 11:16 12:9,12,13,15,16 14:14,22 15:9,10,14 16:18 22:24 26:8,21,23 27:1,13 28:6 29:4 30:15,19 32:19,22 35:2,4 39:16 40:17,21 45:24 46:2,24 47:4,14 52:10 53:8,9,10,12,13 54:3 76:9 77:4,19,21 83:18 93:10 100:14 101:2 104:18 105:10,17,19,19 Defense's ^[1] 46:12 defined ^[1] 74:12 defines ^[3] 4:17 21:9 36:18 definition ^[9] 19:19 59:7,8,16 66:8,12 68:10 72:5 99:15 definitional ^[1] 71:14 definitions ^[14] 24:19,21 36:20,22,23,25 37:2,3 52:8 99:7 103:10,17,18,20 definitive ^[1] 91:17 degree ^[1] 92:11 delegated ^[3] 14:17 57:18 58:20 delegates ^[1] 40:19 delegation ^[6] 6:22 40:6,17 44:17,18 45:8 delegations ^[1] 58:16 delegees ^[1] 58:17 deliberately ^[1] 98:4 demonstrates ^[1] 95:4 denied ^[1] 85:21 DEPARTMENT ^[90] 1:4 2:5 4:5 5:6 6:7,9,15 7:5,10,15 9:14,22,23 10:8,9,10,11 11:5,12,16,19 12:9,11,14,16,16 14:14,22 15:8,10,14 16:18 19:20 22:24 26:8,21,23 27:1,13 28:7 29:4 30:14,19 32:4,19,22 34:22 35:2,4,25 36:8,10,10 37:19 39:16 40:17,21 45:23 46:2,12,23 47:4,14 48:9 52:9 53:8,9,10,11,12 54:2 60:2,8 66:9 74:8,8 77:19 93:10 96:18 100:14,18 101:2,3,3 103:2 104:18 105:10,17,19,20 Department's ^[2] 10:15 11:1 departments ^[11] 4:18,23 21:19 24:1 75:5 99:16,18,20 100:20 101:21,25 depends ^[1] 52:7 designate ^[3] 11:8 50:3 69:20 designated ^[5] 41:24 50:25 52:21 56:14 57:25 designation ^[8] 41:3 56:1 60:14,16,16 61:10 71:4 97:5 designee ^[4] 8:13 24:1 69:22 103:15 designees ^[2] 5:13 103:14 determinations ^[1] 13:2 determine ^[2] 20:18 97:17 detrimental ^[1] 47:6 difference ^[1] 60:11 different ^[7] 33:2,18 37:23 38:11,23 64:21 65:21 difficulties ^[2] 72:17 88:25 difficulty ^[1] 58:22</p>	<p>direct ^[1] 57:4 directly ^[2] 38:16 93:16 disagree ^[3] 18:21 28:6 37:1 disagreement ^[1] 91:12 disappear ^[1] 99:13 discharge ^[1] 93:15 discretion ^[2] 51:3 70:7 dispositive ^[1] 31:16 dispute ^[5] 10:1 12:18 37:18 47:24 86:10 disputes ^[4] 7:4 28:11 30:20,20 disputing ^[4] 8:5 9:3 33:22 55:3 distinct ^[1] 78:18 distinction ^[5] 65:3 69:2,5 70:9 99:9 distinguishing ^[1] 65:25 DoD ^[77] 11:25 12:2,25 14:9,11,15 15:2,4,6,21,21 17:5,7 18:20,25 19:1 22:4 23:20 25:24,25 26:15 27:24,24 32:4,8 44:19 45:3,5,12 47:22 48:3,11 51:17,22 52:15 53:22,23 54:11 55:23 56:1,7,25 57:6 67:1 71:13 72:4,18,25 73:12,12 76:18,22,24 78:1,3,22,24 81:24 82:4,7 83:25 87:2 88:4,17 92:9,12,16 93:1,1,20,21 95:9,12,13 101:22,25,25 DoD's ^[4] 15:5 81:21,23 82:9 doing ^[9] 24:4 27:25 29:19,20 37:5 41:17,21 52:12 79:17 DOJ ^[1] 60:1 done ^[11] 6:21 27:12 28:3 39:19 40:13 42:8 49:3 59:10 79:4 82:8 92:5 down ^[6] 9:7,11 26:25 27:7 44:24 45:2 drawn ^[1] 81:1 dual ^[3] 29:1,10 94:25 dual-service ^[2] 13:6 38:23 Dual-status ^[17] 6:6 38:10 55:20 60:18 63:7,13,25 64:20 67:12,18 76:20 79:16 84:4 87:7 90:13,15 98:19 dues ^[14] 10:10 11:3 27:2,3 46:13,14 86:24 87:6 94:24 95:9,10 105:2,5,6 duty ^[3] 63:16 74:20 85:2</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>effective ^[1] 37:20 effectively ^[3] 60:25 61:6,7 eh ^[1] 96:21 either ^[3] 41:14 60:7 62:15 elections ^[1] 50:5 emphasize ^[5] 13:18 39:7 41:3 46:10,22 employ ^[7] 4:14 5:7 11:9 12:10 55:24 58:8 96:25 employed ^[2] 12:11 55:22 employee ^[8] 8:1,2,4 45:4 55:6 62:17 73:16 74:11 employees ^[53] 6:6,14,25 7:2 8:7 9:3 10:8 11:13 15:5 22:1,9 24:14 25:8,10 27:12 38:14,25 44:20,22</p>
--	---	--	---

Official - Subject to Final Review

<p>45:10 51:8,25 54:8,19 55:22 56:7 58:8 61:3,17,25 62:1,18 64:24,25 66:4 68:3 70:5 71:10 72:19 74:22 76:7,18,22 78:15 79:17 89:22 90:3 92:2 94:15 96:20 97:10,11 104:4</p> <p>employees' [1] 58:10</p> <p>employer [11] 9:14 25:12,15 26:1, 2 41:24 44:25 45:2 52:1 70:12 89: 21</p> <p>employers [2] 28:15 65:1</p> <p>employing [5] 22:8 51:19 56:16 57:11 67:12</p> <p>employment [14] 13:12 22:16 26: 16 44:23 55:19 58:11 60:18 61:12 67:11 92:20 93:17 96:2 99:3 104: 8</p> <p>employs [3] 21:25 22:15 60:25</p> <p>empowers [1] 6:19</p> <p>enacted [2] 5:17 81:5</p> <p>end [5] 9:23 10:17,22 25:22,25</p> <p>enforce [9] 6:7 34:2,23 35:1 38:19 57:9 73:11,14 84:2</p> <p>enforceable [1] 35:10</p> <p>enforcement [5] 57:5 72:17 78:1, 3,23</p> <p>enforces [1] 56:25</p> <p>engage [5] 10:13 29:2 39:22 76:10 77:16</p> <p>engaging [1] 77:14</p> <p>enough [1] 66:7</p> <p>ensure [1] 10:3</p> <p>enter [2] 9:16 15:11</p> <p>entered [4] 97:15,20,23 98:1</p> <p>entire [1] 44:15</p> <p>entities [15] 14:17 20:15 21:24 22: 7 23:25 28:14,19 30:1 51:11 56: 13 57:25 59:18 64:25 67:21 103: 22</p> <p>entity [19] 9:23 17:13 20:10 22:13 24:13 28:7 29:19,20 52:6,19 68:5 70:17 73:22,24 76:25 82:8,13 91: 4 94:9</p> <p>enumerated [1] 21:18</p> <p>envision [1] 67:10</p> <p>equipment [1] 104:1</p> <p>erred [1] 47:2</p> <p>especially [1] 23:9</p> <p>ESQ [4] 3:3,6,9,12</p> <p>ESQUIRE [1] 2:7</p> <p>essence [2] 11:6 92:5</p> <p>essentially [2] 44:3 94:9</p> <p>establish [1] 13:14</p> <p>establishments [2] 4:20 5:1</p> <p>ET [4] 1:4,8 19:14 49:6</p> <p>evanescent [1] 99:11</p> <p>even [20] 5:16 8:12 15:2 26:22 28: 6 30:20 37:6,7 39:7,13 42:13,22 46:1 48:24 50:25 65:18 86:7 88: 11 98:22 103:25</p> <p>event [2] 37:4 87:16</p> <p>everybody [4] 23:20 27:8 52:19 90:3</p> <p>evolve [1] 5:21</p>	<p>exactly [2] 7:25 56:15</p> <p>example [5] 16:8 27:2 45:17 50:21 56:3</p> <p>examples [2] 50:7 61:4</p> <p>exclude [1] 59:24</p> <p>excluded [1] 23:4</p> <p>excludes [1] 59:18</p> <p>exclusions [2] 59:16 68:15</p> <p>exclusive [1] 24:5</p> <p>excuse [1] 38:15</p> <p>executive [16] 4:18,23 5:2 17:17, 21 19:20 41:14,20 66:4,8 80:4,7 98:10 99:10,16 100:18</p> <p>executive's [1] 66:3</p> <p>exercise [1] 34:15</p> <p>exercising [3] 43:9 44:6 67:24</p> <p>exerted [1] 89:24</p> <p>exist [1] 30:1</p> <p>expect [1] 23:3</p> <p>expertise [1] 30:16</p> <p>explain [5] 7:2,25 9:19 13:17 47:2</p> <p>explaining [1] 98:11</p> <p>explains [1] 52:5</p> <p>explicit [4] 44:17,18,21 45:8</p> <p>explicitly [4] 17:22 40:7 81:6 85:9</p> <p>expressly [2] 45:17,17</p> <p>extent [12] 22:6 49:3 64:22 66:5, 20 70:2 82:2 83:5 87:13,21 98:18, 19</p> <p>extremely [1] 64:2</p>	<p>federally-recognized [1] 67:4</p> <p>Federation [1] 66:23</p> <p>fellow [1] 44:13</p> <p>few [2] 12:9 58:24</p> <p>Field [7] 17:22 48:23 79:24 80:5 91:16 97:14 98:1</p> <p>Fifty [1] 79:9</p> <p>fight [3] 92:7 103:11 104:17</p> <p>figure [4] 20:22 38:18 70:11 75:9</p> <p>filed [2] 85:19 87:5</p> <p>filing [1] 87:4</p> <p>final [1] 70:4</p> <p>finally [1] 46:21</p> <p>find [5] 6:3 19:4 52:8 74:25 91:10</p> <p>fine [2] 84:11,12</p> <p>fire [11] 12:21 13:10 14:18 56:6 58: 10 60:17 61:11,16 62:3 70:7 84:5</p> <p>fires [3] 21:25 22:14 62:17</p> <p>firing [7] 22:8 23:22 24:14 25:16 64:20 67:25 70:4</p> <p>first [17] 9:22 13:1,16 16:23 32:14 35:12 39:6 43:6 59:6 61:23 62:25 64:14 72:1 77:8 91:18 103:7 104: 20</p> <p>fit [1] 71:2</p> <p>five-day [1] 93:24</p> <p>fix [2] 41:12 42:8</p> <p>fixed [1] 42:11</p> <p>FL [1] 13:23</p> <p>FLOWERS [120] 2:2 3:3,12 4:7,8, 10 6:11,13,19,23 7:1,12,19 8:3,21 9:1,13 10:17,21 11:16,22 12:8 13: 16,24 14:1,3,11,13,21 15:7,25 16: 6,16 17:7 18:6,10,21 19:2,7,22 20: 17,24 21:7,12,15 22:5,20 23:2,11, 18,23 24:17 25:5 26:6,18 27:16, 20 28:2,5 29:5,12,22 30:4,13 31:6, 10,15,20,24 32:1,6,15,24 33:16,21, 25 34:5,11,14,25 35:7,11,17,20,22 36:4,16,21 37:1,12,17,24 38:6 39: 1,5 40:12,19 42:6,20 43:8 45:14 47:19,23 48:5,13,17 49:9 50:17, 23 52:2 53:2,16 54:2,5,13,22 86: 18 102:18,19,21</p> <p>Flowers' [1] 71:7</p> <p>FLRA [25] 20:4 23:24 28:7 46:24 49:15 56:25 57:9 72:2,22 73:11, 12,15 77:12 82:16 87:25 88:9,23 89:23 90:2 91:24 92:3,5 96:13 103:2 105:25</p> <p>FLRA's [5] 55:17 56:18 57:5 87:20 89:19</p> <p>focused [1] 84:23</p> <p>foisted [1] 41:25</p> <p>follow [3] 38:8 66:22 105:11</p> <p>Force [7] 11:19 32:5 48:9 74:8 83: 20 101:4,21</p> <p>forced [4] 9:17 42:2,4 65:18</p> <p>Forget [1] 60:23</p> <p>form [2] 38:12 95:15</p> <p>forms [5] 87:4,6,8 94:23 95:8</p> <p>forth [4] 25:16 45:9 69:3 91:8</p> <p>forward [2] 58:6 91:24</p> <p>found [2] 23:24 96:13</p>	<p>frankly [1] 30:16</p> <p>Fred [1] 75:22</p> <p>free [1] 79:17</p> <p>freeze [1] 80:18</p> <p>friend [1] 73:3</p> <p>friendly [1] 83:16</p> <p>front [1] 9:23</p> <p>frustrate [1] 39:19</p> <p>frustrated [1] 10:4</p> <p>FSLMRS [1] 13:23</p> <p>fulfill [1] 51:1</p> <p>full-time [1] 74:10</p> <p>fully [3] 34:14 49:20 58:8</p> <p>function [2] 22:21 97:5</p> <p>functional [1] 59:12</p> <p>functioning [2] 22:18 70:12</p> <p>functions [2] 22:15 70:18</p> <p>fundamental [1] 103:7</p> <p>funded [1] 62:1</p> <p>funding [9] 16:8 57:8 61:9,17 72: 25 73:14 78:5 84:1 106:8</p> <p>further [6] 49:5 73:10 76:1 98:22 101:13 106:10</p>
<div>F</div>			
<p>F.2d [1] 20:4</p> <p>fact [12] 8:10 9:10 15:14 32:17 38: 21 44:16 58:12 61:21,25 63:13 101:20 104:19</p> <p>facts [1] 87:22</p> <p>failed [1] 33:12</p> <p>failure [1] 47:11</p> <p>Fair [2] 66:6 87:12</p> <p>far [5] 30:22 47:5 51:9 65:9 67:21</p> <p>favor [1] 91:1</p> <p>favorable [1] 93:22</p> <p>FBI [4] 59:18,24 60:1,9</p> <p>feature [1] 65:25</p> <p>FEDERAL [141] 1:7 2:6 3:7 4:6,12, 15 5:25 6:1,19,24 7:1,9 8:1,4,7,8, 12,13 11:13,13,14 13:21 14:5,6,19 16:24 17:13 20:11 22:1,8 25:11, 13 28:22 29:25,25 30:22,22 31:12, 13 38:13 50:4,9,15 51:1,2,4,7,11 55:6,7,13,19,22 56:1,5 57:8 58:2, 8,10,25 59:3 60:15,25 61:6,7,9,10, 19,21,25 62:1,4,18,18,23 63:9,9, 10,14,16 64:9,25 65:1 67:9,11,14 68:1,5,7,25 70:4 71:5 72:25 73:1, 7,16,22,23 74:11,20,21 75:4,4,10, 10 76:21 78:4,5,7,9 79:17 81:10 83:9,10 84:1,1 89:10,12,17,22 90: 3,6,12,16 92:2 94:13,14,15,24 97: 10 98:18,25 104:2,4,5,6,8,9 105:4, 6 106:8</p> <p>federalism [2] 60:22 89:6</p> <p>federally [2] 62:1 67:6</p>			
<div>G</div>			
<p>gap [1] 59:4</p> <p>gather [1] 75:12</p> <p>gave [1] 61:24</p> <p>General [52] 2:2,5 4:14,20 5:4 6: 14,17 7:17,19 10:6 11:8 12:18 16: 9 23:7 24:10 27:15 39:21 41:4 43: 1 46:24 47:8 50:8 56:4,6,22 69:21 70:3 71:7 73:2,25 74:4,5 76:5 77: 18,22 78:2,7,8,12,13 86:18 88:18 89:15 91:15,20 92:21 93:2,15,19 94:5 98:17 102:18</p> <p>GENERAL'S [3] 1:3 4:5 19:4</p> <p>generally [6] 10:23 13:20 14:4 17: 12 29:24 87:24</p> <p>Generals [9] 41:25 44:13 45:5 64: 6 74:17 89:9,18 90:11 97:13</p> <p>generic [1] 21:17</p> <p>generis [2] 25:11 79:5</p> <p>gets [3] 60:12,13 93:22</p> <p>getting [2] 16:23 77:17</p> <p>give [6] 5:18 15:6 21:11 26:15 40: 24 44:19</p> <p>given [9] 5:23 14:21 38:20 42:1 43: 10 45:7 51:25 62:2 95:8</p> <p>gives [6] 5:11 13:5 23:13 25:6 57: 3 92:19</p> <p>giving [1] 96:19</p> <p>Gorsuch [27] 47:16 60:20 61:13 62:6,8,19 63:1,18 64:3,7 65:4 81: 19 94:18 97:19,22 98:13,24 99:4, 6,23 100:1,4,10,15,19 101:5,13</p> <p>Gorsuch's [3] 82:18 83:2 101:18</p> <p>got [2] 34:16 75:11</p> <p>govern [3] 10:12 29:15 51:24</p> <p>government [29] 4:19,24 8:14 13: 21 14:5 16:24 25:12,13 29:25 37: 7 51:1,4,7,11 55:7 60:25 61:6 62: 21 64:7 68:5,7 73:23 94:25 95:16 104:1,2,5,9 105:7</p>			

Official - Subject to Final Review

<p>government's ^[2] 50:22 51:3 governments ^[1] 51:9 GRAJALES ^[31] 2:7 3:9 90:21,22, 24 93:12 94:11 95:1,13,17,20 96: 3,9,12,23 97:4,25 98:21 99:1,5,24 100:3,7,13,17,24 101:6 102:5,8,11, 16 grant ^[2] 6:2 34:14 granted ^[2] 16:19 37:15 great ^[1] 98:5 greater ^[1] 30:18 ground ^[2] 30:12 34:16 grounded ^[1] 66:16 group ^[3] 14:19 89:21 90:3 Guard ^[27] 7:10,14,21 9:11 16:11 17:24 18:4 23:8 26:2,4 32:9 43:6 46:19 67:5 72:19,20 73:2 84:18 91:6,21 93:11 94:21 95:8,15 97:9 98:7,8 Guard's ^[1] 73:14 guards ^[22] 4:14,21 5:5 6:2 10:5 13:19 25:14 26:17 27:14,25 28:19 33:8 41:15 42:13 57:9 66:25 67:6 73:7 75:16 81:8 91:15 106:9 guess ^[16] 12:6,21 13:13 21:20 22: 12 45:7 51:17 52:18 54:23 67:2 69:7 71:22 75:14 82:21 88:2 94:3</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half ^[1] 94:7 hand ^[1] 87:3 handle ^[3] 9:21 104:18,19 handles ^[1] 12:2 handling ^[2] 12:1 16:24 happened ^[3] 17:17 72:24 87:1 happening ^[2] 54:9 101:20 happy ^[1] 93:5 hard ^[3] 6:3 58:7 104:18 hat ^[2] 89:20 94:16 hats ^[2] 74:23 75:17 head ^[6] 48:6,8 58:16 74:12 75:4 76:24 hear ^[2] 4:3 57:16 heard ^[1] 92:13 heart ^[1] 70:19 heavily ^[1] 66:16 held ^[3] 4:13 24:7 47:24 help ^[1] 53:3 helpful ^[3] 58:24 59:15 82:1 helps ^[1] 59:4 high-level ^[4] 59:11,21,25 82:12 highly ^[1] 43:12 highway ^[1] 7:24 hire ^[22] 6:17,20 12:20 13:10 14:18 24:3 31:4,5 32:10 40:20 45:9 56:6 57:18 58:9 60:17 61:11,16 62:3 65:19 70:7 84:5 96:19 hired ^[1] 6:13 hires ^[5] 6:12 21:25 22:14 56:5 62: 17 hiring ^[8] 22:8 23:22 24:14 25:16 64:19 67:25 70:4 89:25 historically ^[2] 72:2,10 history ^[6] 23:9 33:3,6 34:8 38:20</p>	<p>102:9 hoc ^[1] 104:12 hold ^[1] 73:12 holding ^[1] 58:12 Homeland ^[1] 60:2 honor ^[2] 42:2 43:7 hours ^[2] 26:23 29:17 House ^[1] 33:13 However ^[2] 35:24 98:22 hundreds ^[1] 80:15 hurt ^[2] 85:6,8 hypothetical ^[3] 61:23 82:18 83:3 hypothetically ^[1] 83:19</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea ^[3] 9:5 12:12 94:6 ideal ^[1] 84:3 identifiable ^[1] 72:9 identified ^[1] 77:25 identify ^[3] 23:16 62:16 88:24 illuminates ^[1] 34:8 imagine ^[3] 58:7 73:10 88:13 immediate ^[1] 85:7 immense ^[5] 10:5 14:23 30:25 31: 1 37:20 implicates ^[3] 63:5 90:14,15 implications ^[4] 50:11 60:22 73:6 79:2 importance ^[1] 46:22 important ^[6] 10:7 13:17 39:12,14 64:15 71:25 importantly ^[1] 41:18 impose ^[1] 47:8 imposition ^[1] 40:9 impractical ^[1] 86:7 impression ^[1] 100:11 inadvertent ^[1] 34:10 incident ^[1] 93:25 include ^[5] 4:18 30:1 49:10 85:11 100:12 included ^[3] 21:22 50:13 100:20 includes ^[4] 57:24 58:1 100:11,13 including ^[2] 29:16 44:23 inconsistent ^[3] 49:13 92:14 93:3 incorporates ^[1] 103:19 incorporating ^[1] 21:23 Indeed ^[3] 5:15 53:16 55:6 independent ^[4] 4:19 5:1,25 30: 22 indicate ^[6] 56:12 59:1,10 80:1 81: 24 82:1 indication ^[3] 68:10 79:8 82:12 individual ^[4] 25:14 27:14 69:14 75:15 Industrial ^[1] 66:24 influence ^[5] 10:5 16:1,21 31:1 37: 20 inhibition ^[1] 64:8 initial ^[1] 7:21 initially ^[1] 84:25 injuries ^[1] 10:25 inoperative ^[1] 92:17 inquiry ^[1] 52:7 INS ^[2] 20:4 49:15</p>	<p>inside ^[1] 101:24 insisting ^[1] 24:23 insofar ^[2] 20:20 21:25 installation ^[1] 59:12 instance ^[2] 9:22 13:2 instances ^[1] 45:15 Instead ^[4] 25:13 34:19 56:25 72: 21 instruct ^[1] 78:2 instruction ^[2] 78:21,22 intend ^[4] 22:17 38:4,7 50:13 intended ^[7] 13:15 20:16 21:6 37: 16 38:10 97:18 101:1 intent ^[2] 21:8 23:6 intents ^[1] 20:25 interest ^[3] 64:12 72:9 105:24 interesting ^[1] 49:19 interests ^[4] 7:20 9:24 30:21 106: 5 interfere ^[2] 41:22 105:24 interference ^[1] 41:23 Intergovernmental ^[1] 51:6 Interior ^[1] 103:2 interpretation ^[2] 24:18 36:25 interpreted ^[3] 18:15 19:23 21:8 interpreting ^[4] 13:18,23 18:19 80: 3 interprets ^[2] 23:25 49:12 interrupt ^[1] 98:14 intervened ^[1] 7:20 intervenor ^[1] 7:17 intimately ^[1] 65:13 invoking ^[1] 50:7 involve ^[1] 29:6 involved ^[4] 11:5 39:17 65:22 90: 2 involving ^[2] 17:23 73:15 isn't ^[10] 7:6 15:1 27:18 51:20 52:6 60:15 65:22 68:2 79:2 89:22 isolated ^[1] 34:9 issue ^[26] 4:16 5:10,11 6:1 8:9 11: 11 14:13 15:12,13 33:7 36:2 40: 25 44:11 45:24 46:15,17 55:2 65: 21 68:21 82:23 83:3 84:16,23 88: 13 93:1,20 issued ^[8] 15:24 17:20 19:24 45: 16 49:9 57:1 79:24 86:9 issues ^[7] 10:11,23 26:21 66:14 82:24 88:9 104:21 issuing ^[1] 72:22 itself ^[9] 19:16 49:2 51:4 65:11 68: 9 70:15 84:22,24 97:14</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JACKSON ^[45] 12:20 13:22,25 14: 2,9,12,15,25 20:12,20 21:2,10,13, 16 22:6,25 23:3,17,19 24:9 25:1 28:16 37:22,25 38:8 40:1 51:13, 14 52:11 53:14,17 54:4,6,16 70:8, 24 89:4,5 90:10,18 101:16,17 102: 7,10,13 Janice ^[1] 43:19 January ^[1] 1:13 Judge ^[2] 49:16 52:3</p>	<p>judicial ^[1] 49:11 juncture ^[1] 83:16 jurisdiction ^[2] 5:25 14:7 Justice ^[283] 2:5 4:3,11 6:11,16,21, 24 7:6,16,22 8:19,22 9:2 10:16,19 11:4,18,20,23,24 12:20 13:4,8,22, 25 14:2,9,12,15,16,25 15:2,17,19 16:3,12 17:3,14 18:7,18,22 19:3, 18 20:12,20 21:2,10,13,16 22:6,25 23:3,10,17,19 24:9 25:1,3,6 26:10 27:5,18,21 28:3,16,17 29:8,18 30: 3,5,7,8 31:4,7,11,17,22,25 32:2,7, 21 33:1,20,23 34:4,7,12,19 35:3,5, 8,15,18,23 36:5,19,24 37:9,13,22, 25 38:8 39:3 40:1,2,4,5,16 41:8,8, 9,10,11 42:10 43:5,22,22,23 47:15, 15,17,18,20 48:1,11,14,18 49:18, 23,23,25 50:18 51:12,12,14,15,16 52:11,18 53:14,17 54:4,6,16 55:9, 14 57:16 58:15 60:4,9,20 61:5,13 62:6,8,19 63:1,18 64:3,7 65:4,8, 16 66:6,11,21 68:2,4,13 69:1,10, 19 70:8,9,20,24 71:6,22 72:13 73: 20 74:3,10,14,24 75:7,18,21,25,25 76:2,3,3,4 77:2,17 78:10,25 79:21 80:6,9,12,16,23,23,25 81:7,13,15, 17,18,18,19,20 82:17,17 83:1,2,12, 24 84:7,9,15 85:13,23 86:3,4,4,6, 17,21 88:1 89:3,3,5 90:10,18,19, 25 93:7 94:3,17,18,19 95:12,14,19, 22 96:4,10,17,24 97:19,20,22,23 98:13,24 99:4,6,23 100:1,4,10,15, 19 101:5,9,11,12,13,15,16,17,18 102:7,10,13,14,17,22,24 105:13 106:13 Justice's ^[1] 76:15 justification ^[1] 5:18 justified ^[1] 24:24 justify ^[1] 23:12</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[23] 8:19,22 9:2 11:20,23 13:8 15:2 25:3,6 26:10 27:5,18,21 28:3 43:22,23 51:15 60:4 70:20 71:6,22 72:13 81:18 Kagan's ^[3] 15:19 41:11 52:18 KAVANAUGH ^[44] 10:16,19 11:4, 18,24 13:4 14:16 30:3,7 31:4,7,11, 17,22,25 32:2,7,21 33:1,20,23 34: 4,7,12 47:17,18,20 48:1,11,14,18 49:18 81:20 82:17 83:1,12,24 84: 7,9,15 85:13,23 86:3 105:13 Keep ^[6] 10:19 30:7 38:1 51:16 96: 24 103:16 keeps ^[1] 43:13 kept ^[2] 18:13 34:21 kind ^[9] 15:18 25:10 33:2 38:24 52: 14 69:3 70:6,18 99:9 kinds ^[1] 61:14</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>LABOR ^[16] 1:7 4:6,13 6:1,8 7:9 30:23 37:5 42:17 51:24 52:24 53: 25 54:9 58:25 66:23 90:6</p>
---	---	---	--

Official - Subject to Final Review

<p>large [3] 70:6 80:13 89:15 larger [1] 102:23 last [6] 28:6 52:3 72:24 73:19 79:20 85:13 late-breaking [1] 56:22 latter [2] 86:16,20 Laughter [4] 35:21 49:22 71:21 86:19 law [27] 6:19 13:18,20,22 17:4 28:15 29:25 30:2,23 31:13 35:12 36:1 43:14,21,24 45:19 49:13 50:4,15 52:13 53:2 74:12 83:11 87:14 89:10,17 105:2 laws [1] 51:24 leap [1] 58:22 least [5] 7:8,13 34:12 36:2 80:15 leaves [2] 93:18 100:10 left [1] 41:19 legal [6] 30:10 37:10,14,18 69:5 88:7 legally [1] 42:4 legislation [2] 33:11 84:25 level [2] 72:3 77:10 levels [1] 76:25 lies [1] 59:2 light [1] 23:9 likely [1] 47:5 limit [5] 63:19,24 93:9,12 98:22 limited [10] 16:19 57:12 58:18,19 70:3 78:23 89:23 94:12 99:2,2 limits [6] 65:5 77:20,25 78:1 82:21 91:10 line [1] 38:9 linings [1] 78:18 Lipscomb [1] 85:19 list [1] 22:4 listed [5] 21:18,24 22:14 60:7 68:12 little [4] 12:22 41:21 69:12,18 local [1] 51:8 long [7] 21:7 42:12 43:13,20 54:13 56:24 79:15 longer [1] 96:1 longstanding [1] 43:2 look [12] 20:4 62:5 65:2 67:21,22 70:5 71:23 72:1 91:22 94:20 97:16 103:13 looked [2] 42:11 103:2 looking [2] 24:10 46:6 lot [3] 30:11 62:5 65:2 lower [2] 76:25 77:10</p>	<p>matter [4] 1:15 30:2 91:14 103:15 matters [4] 16:22 41:19 77:11 82:4 McGirt [1] 43:19 mean [24] 9:5 12:14,21 15:3,8 20:13 29:3 32:24 37:23 42:23 48:21 60:9,10 68:23 69:17 70:10 73:24 75:2,8,14 79:10 88:1,14 97:13 meaning [4] 6:5 17:11 21:1 69:13 means [5] 8:15 13:9 15:9 20:19 71:11 meant [4] 20:22 72:10 79:7 85:23 mechanism [1] 101:8 Medicaid [2] 50:4 61:4 Medicare [1] 61:4 members [2] 75:16 85:4 mention [2] 46:25 99:17 mentioned [1] 17:2 mere [1] 30:18 merely [1] 61:9 Merit [1] 96:10 mess [1] 50:16 metaphysical [1] 52:7 might [17] 9:16 12:23 16:14 28:11 32:15 50:12,16 54:23 65:16 82:3,22 87:23 88:16 103:23 105:1,2,13 military [27] 30:16,21 33:11 39:14 41:19 53:10 63:9,10,16 65:11,22 66:1 67:14 74:18 75:4 82:3 85:2,4,8 90:12 98:3 99:17,19 100:20 101:25 105:24 106:4 military-specific [1] 47:12 militia [6] 60:23 62:22 63:5 65:12 66:2 91:8 militias [2] 24:7 103:25 mind [2] 64:12 103:17 minimize [1] 14:23 Minnesota [1] 17:23 minor [2] 73:15 87:22 misinterpreted [1] 47:2 Mississippi [3] 17:23 36:3,4 Mm-hmm [5] 21:15 22:5 25:5 33:20 75:23 moment [1] 60:23 Monday [1] 1:13 most [10] 7:3 10:7 26:22 41:18 58:3 67:23 73:25 74:2 75:5 103:7 moved [1] 92:16 moving [1] 69:2 Ms [62] 55:11,14 57:23 58:23 60:13 61:8,22 62:7,13,24 63:4,23 64:5,13 65:6,8,15,23 66:15 67:8 68:3,8 69:1,11,24 70:23 71:6,24 72:15 74:1,6,13,16 75:2,13,20,23 76:13 77:7,24 78:17 79:6 80:1,9,14,19 81:4,12,15,23 82:25 83:23 84:8,13,20 85:17,25 86:16,20 88:19 90:9 99:19 much [3] 7:23 30:18 83:23 multiple [2] 56:11 79:12 must [8] 24:23,24 46:6 56:17 57:12 90:5 92:23,24 myriad [2] 10:11 29:15</p>	<p>N</p> <p>named [1] 41:16 National [30] 7:10,21 13:19 16:11 17:23 18:4 23:8 28:19 41:15 42:13,17 43:6 57:9 66:25 67:5,6 72:19,20 73:1,7,8,14 75:16 81:8 91:6,15,21 93:11 97:8 105:11 nationwide [5] 27:12,24 71:17 72:3,11 natural [2] 32:11,12 naturally [2] 46:7 60:9 nature [1] 38:11 nearly [1] 72:24 necessarily [2] 21:23 68:23 necessary [1] 87:4 need [6] 27:22 45:21 53:7 59:24 66:11 97:16 needs [2] 15:15 27:23 negate [1] 57:2 negotiate [1] 36:7 negotiated [1] 92:23 negotiates [1] 29:3 negotiating [1] 9:25 negotiation [2] 28:9 29:20 neither [1] 4:22 never [5] 33:13,15 37:3 51:10 75:19 new [2] 16:10 46:4 next [1] 4:4 NICOLE [3] 2:4 3:6 55:12 Ninth [1] 20:5 nobody [2] 70:16 75:8 non-agencies [1] 5:12 non-component [1] 19:11 none [3] 4:21 19:22 63:22 nor [2] 4:22 91:3 normal [1] 76:21 normally [1] 77:3 note [2] 29:17 40:15 nothing [5] 46:19 62:9 74:15 75:11 103:5 novel [1] 5:22 nuclear [1] 57:7 number [4] 74:17 80:13 88:16 93:16</p> <p>O</p> <p>objecting [1] 33:8 objection [1] 12:6 objective [2] 21:1,3 obligation [2] 9:10 15:3 obligations [5] 57:13 60:18 79:18 92:9 98:9 obviously [3] 48:22 63:24 83:3 occasionally [1] 99:12 odd [5] 28:18 29:19,23 50:8 68:2 oddity [1] 31:11 offered [1] 61:5 Office [1] 19:4 officer [6] 31:13 50:9 74:11 75:10 90:5,5 officers [1] 62:22 officials [2] 50:3,5</p>	<p>often [3] 59:2,10 82:12 OHIO [28] 1:3 2:3 4:4 7:10 12:7,17 60:10,12,13 71:17,18,19 72:14,17,21 86:6,13,14 87:13 88:5,14,17,21,24 91:12 92:21 98:17 105:14 Okay [15] 13:25 32:7 35:17 36:11 39:1 43:15 49:19,21 54:4,16 60:23 62:6 72:13 75:25 99:4 once [3] 30:15 43:15 83:13 one [30] 5:18 17:21 19:1,9 26:9 27:1 29:19 33:2 42:25,25 44:5,9 47:20 55:18 62:15 63:8,9,10 73:9 74:18 78:14 79:8 85:13,13 88:4 91:25 92:15 102:22 103:2,4 ones [3] 11:11 29:9 88:8 only [21] 8:9 9:23 14:7 20:20 21:23 24:12 40:7 42:25 43:5 54:24 56:6 59:21 62:14,15 83:24 89:19 95:14 98:7 99:1 100:24 103:9 onus [1] 88:20 open [1] 86:11 opening [1] 50:1 operable [1] 12:25 operates [3] 30:12 95:5,6 opinion [2] 49:17 52:4 opportunity [1] 96:19 opposed [3] 21:24 27:13,25 option [2] 57:7 78:6 options [2] 78:3,24 oral [7] 1:16 3:2,5,8 4:8 55:12 90:22 order [35] 8:9 10:23 15:22,23,23 16:1,3 22:21 37:2,3 45:16,24 46:13 56:25 72:22 73:14,15 76:10 77:6,15,21 78:11,18,21 86:8,23 88:12 91:19 93:2,10,20 98:10 105:23 106:2,3 ordered [4] 11:2 27:3 77:9 78:13 orders [21] 4:16 5:10,11 6:1 14:14 15:13 17:17,21 40:25 41:14 55:2,17 56:18 57:9 78:19 80:4 87:20,25 88:10 89:2 104:24 ordinary [1] 72:23 Organizations [2] 66:24 67:4 organizing [1] 23:22 original [1] 35:24 other [47] 9:7 11:10 19:12 23:5,23 24:11 25:22,24 28:24 33:2 35:9 36:1 38:13,24 40:13 43:18 49:8 50:2,14 54:9 56:2 59:13 61:3,15 62:8,11 63:21 64:11 65:5 66:14 68:7,24 73:4 74:23 78:19 88:5,13 89:1 91:2,4 97:17,17 98:25 99:14 102:2 103:22 104:12 others [1] 86:9 otherwise [4] 16:14 18:24 23:14 24:5 ourselves [3] 8:8 46:17 105:5 out [28] 10:1 12:3 13:5,8,15 14:16 15:15 19:4 20:22 22:18,22 23:10 30:20 38:18 45:5 50:2 61:20 70:10,11 73:9 75:9 79:11 81:14 88:3,10 92:15 94:2 104:3 outer [1] 93:12</p>
---	---	--	---

Official - Subject to Final Review

<p>outright ^[1] 82:5</p> <p>outside ^[2] 87:14 101:22</p> <p>over ^[28] 6:1 10:5 13:11 14:7,18,23 16:2 23:21,21 26:16 28:11 30:25 31:1 37:20 41:5 45:6 46:11,19,23 63:15 85:3 90:12,14 92:19 96:2, 14 100:22 104:20</p> <p>oversee ^[1] 66:3</p> <p>overturned ^[1] 94:1</p> <p>own ^[2] 5:22 99:21</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 106:15</p> <p>PAGE ^[7] 3:2 49:25 50:1 59:9,17 72:7 103:5</p> <p>paid ^[1] 94:25</p> <p>paragraphs ^[1] 52:3</p> <p>part ^[18] 4:22 5:2 9:11 15:6 28:6 36:1 52:9 53:7,12 56:8 60:1,2 69: 20 73:23 96:5 97:8 101:25 103:18</p> <p>partial ^[1] 60:16</p> <p>particular ^[6] 51:19 65:19 70:17 88:13 104:13,14</p> <p>particularly ^[1] 62:10</p> <p>partner ^[2] 27:23,23</p> <p>parts ^[4] 55:23 60:5,6 92:17</p> <p>party ^[3] 7:21 41:17 84:3</p> <p>passed ^[2] 35:13 49:14</p> <p>past ^[1] 43:19</p> <p>patrol ^[1] 7:24</p> <p>pay ^[2] 34:13 97:1</p> <p>peaceful ^[1] 42:18</p> <p>penumbras ^[1] 34:18</p> <p>people ^[11] 13:5,10 14:19 27:8 32: 10 38:14,15 50:12 65:19 89:25 90: 1</p> <p>per ^[4] 14:15 25:13 26:5 65:12</p> <p>percent ^[1] 61:1</p> <p>perception ^[1] 94:4</p> <p>perfectly ^[1] 39:15</p> <p>performing ^[1] 70:17</p> <p>permission ^[1] 42:1</p> <p>permit ^[1] 42:16</p> <p>permitted ^[2] 29:2 87:10</p> <p>person ^[5] 15:20 32:12 77:13,13, 15</p> <p>personally ^[2] 76:11 78:15</p> <p>Personnel ^[1] 51:6</p> <p>perspective ^[1] 58:9</p> <p>petition ^[3] 7:8 85:19,22</p> <p>Petitioner ^[1] 57:16</p> <p>Petitioners ^[32] 1:5 2:3 3:4,13 4:9 55:16,24 56:10,15,16,23 57:10 58: 3 59:5 62:5,16 64:16 67:10,22 79: 15 82:7 83:6,8,10 86:22 87:3,5,18 91:3 92:1 102:20 103:10</p> <p>Petitioners' ^[1] 56:19</p> <p>pick ^[1] 60:21</p> <p>picture ^[1] 45:5</p> <p>places ^[1] 69:13</p> <p>plain ^[1] 6:5</p> <p>plainly ^[1] 37:6</p> <p>plant ^[1] 59:12</p> <p>play ^[2] 55:19 73:9</p>	<p>please ^[4] 4:11 55:15 90:25 97:22</p> <p>point ^[25] 8:22 15:19 23:13,18 24: 19 32:3 34:13 48:16,19,22 49:19 50:2,4,4 51:5 52:18 78:14 79:25 92:15 95:18 100:21 101:18 102: 22,24 104:17</p> <p>pointed ^[4] 13:4 49:15 88:3 99:8</p> <p>pointing ^[1] 70:10</p> <p>points ^[5] 13:8 14:16 23:10 102:23 103:6</p> <p>policies ^[1] 17:19</p> <p>policy ^[3] 13:2 21:5 91:11</p> <p>political ^[1] 37:14</p> <p>pop ^[1] 99:12</p> <p>portion ^[1] 86:23</p> <p>poses ^[1] 93:19</p> <p>posit ^[1] 38:3</p> <p>position ^[5] 5:16 27:6 43:16 45:3 50:22</p> <p>positioned ^[3] 9:21 17:1 104:19</p> <p>possession ^[2] 43:12 48:20</p> <p>possible ^[3] 10:24,25 38:18</p> <p>potentially ^[1] 90:15</p> <p>power ^[21] 5:11,19,24 6:3 14:22 16:19,20 23:12,14,20 24:5 34:16 40:20,25 41:5 43:11 44:19 63:20 64:8 70:22 94:14</p> <p>powers ^[2] 10:4 39:20</p> <p>practical ^[7] 7:3 12:24 22:23 47: 13 88:3,7,15</p> <p>practicality ^[1] 30:18</p> <p>practice ^[2] 43:2 95:7</p> <p>practices ^[2] 17:19 43:20</p> <p>precedential ^[2] 80:2,10</p> <p>predate ^[1] 37:2</p> <p>premise ^[1] 26:19</p> <p>preparedness ^[1] 85:8</p> <p>preserving ^[1] 49:4</p> <p>President ^[9] 31:3 39:17 49:6 68: 15,17 77:6,15 105:20 106:3</p> <p>President's ^[3] 10:3 46:23 106:6</p> <p>presidential ^[1] 10:2</p> <p>pressure ^[1] 37:14</p> <p>pressures ^[1] 35:9</p> <p>Presumably ^[2] 76:9 86:9</p> <p>presumption ^[1] 23:15</p> <p>pretty ^[1] 75:11</p> <p>primarily ^[2] 74:19,22</p> <p>principal ^[11] 8:15,16 16:14 19:9, 10 44:5,7 45:16 53:4,6,18</p> <p>principals ^[3] 43:25 44:2 45:21</p> <p>principle ^[1] 42:20</p> <p>principles ^[1] 53:3</p> <p>prior ^[1] 79:25</p> <p>private ^[1] 24:3</p> <p>probably ^[3] 74:6 95:24 105:25</p> <p>problem ^[9] 5:15 33:18,24 43:10 65:17 79:3 87:24 88:15 93:19</p> <p>problematic ^[1] 87:23</p> <p>problems ^[4] 83:6 88:3,7,7</p> <p>procedure ^[1] 92:23</p> <p>process ^[5] 12:3 18:4 41:22 81:11 82:9</p> <p>processed ^[1] 95:9</p>	<p>processes ^[1] 41:16</p> <p>programs ^[2] 62:12 63:21</p> <p>promised ^[1] 97:2</p> <p>promotions ^[1] 96:11</p> <p>proposed ^[1] 85:1</p> <p>proposing ^[1] 72:18</p> <p>proposition ^[1] 59:21</p> <p>prove ^[1] 32:20</p> <p>provides ^[4] 56:3 61:1,14 68:9</p> <p>providing ^[2] 61:9,10</p> <p>provision ^[4] 44:21 49:2 66:14 82: 11</p> <p>provisions ^[15] 49:6 50:15 56:2, 12 58:25 59:6,15 61:15 66:2,18 67:22 68:12,14,24 87:11</p> <p>pull ^[2] 50:12 84:1</p> <p>pulling ^[1] 78:4</p> <p>purpose ^[11] 22:11,11,16 51:18,19, 23 52:23 53:1 58:19 70:12 99:2</p> <p>purposes ^[19] 8:1 20:11 24:11,19 57:21 64:10 68:6,7 69:15,16 74:2 76:15,17 77:11 81:25 89:13 98:25 104:6,10</p> <p>pursuant ^[1] 55:25</p> <p>purview ^[1] 22:13</p> <p>push ^[1] 26:7</p> <p>put ^[2] 26:3 98:4</p> <p>putting ^[1] 45:12</p> <p>pyrrhic ^[2] 34:20,25</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify ^[2] 4:23 103:23</p> <p>question ^[25] 8:7 14:5 15:1 22:12 25:17 35:24 38:3 45:1 48:19 52:5, 16 54:23,25 66:10 68:13 71:23 73: 24 76:16 83:2 86:12 91:18 92:11 96:13 99:21 102:25</p> <p>questions ^[6] 6:10 57:15 82:18 93: 6 103:21 106:10</p> <p>quick ^[4] 39:5 47:18 102:22,24</p> <p>quickly ^[1] 101:18</p> <p>quite ^[1] 5:18</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>railroad ^[2] 73:5 83:25</p> <p>raised ^[5] 83:5 84:17 85:5,7,21</p> <p>raising ^[2] 82:7 86:1</p> <p>rare ^[1] 64:2</p> <p>rather ^[5] 11:5 12:17 16:21,25 45: 11</p> <p>read ^[7] 18:23 42:23 45:10,11 100: 7,25 104:15</p> <p>reading ^[2] 29:23 51:21</p> <p>real ^[4] 38:3 73:8 88:3,6</p> <p>realize ^[1] 39:12</p> <p>really ^[22] 5:23,24 16:12 22:9 25: 23 37:17 46:21 50:18,20 63:7 65: 21 69:24 70:5 75:14 77:18 84:23 87:17 89:6,23 92:10 96:22 97:16</p> <p>reason ^[9] 6:4 16:22 48:10 77:3 79:14 88:2 104:17 105:3,9</p> <p>reasonable ^[1] 39:15</p> <p>reasoning ^[1] 38:9</p> <p>reasons ^[3] 12:24 69:10 92:13</p>	<p>REAVES ^[65] 2:4 3:6 55:11,12,14 57:23 58:23 60:13 61:8,22 62:7, 13,24 63:4,23 64:5,13 65:6,8,15, 23 66:15 67:8 68:3,8 69:1,11,24 70:23 71:6,24 72:15 74:1,6,13,16 75:2,13,20,23 76:13 77:7,24 78: 17 79:6 80:1,9,14,19 81:4,12,15, 23 82:25 83:23 84:8,13,20 85:17, 25 86:16,20 88:19 90:9 99:19</p> <p>REBUTTAL ^[3] 3:11 102:17,19</p> <p>recent ^[1] 85:18</p> <p>recently ^[1] 85:15</p> <p>recognition ^[5] 57:8 73:1 78:5 84: 2 106:8</p> <p>recognize ^[2] 28:24 67:18</p> <p>recognized ^[5] 18:13 34:17 63:6 64:1 67:6</p> <p>recognizing ^[1] 20:6</p> <p>record ^[7] 94:2 97:13,16,21,24 98: 2,5</p> <p>redress ^[2] 10:25 92:8</p> <p>reduce ^[1] 16:7</p> <p>refer ^[3] 21:17 52:2 98:6</p> <p>reference ^[4] 21:5,17 44:10,11</p> <p>referenced ^[2] 49:1 102:3</p> <p>referred ^[1] 11:8</p> <p>refers ^[1] 67:3</p> <p>Reform ^[24] 4:17 5:7,9,17 13:19, 24 17:11 18:15 19:16,18,24 20:11, 16,19 21:22 22:10 24:20 40:14 41: 4,7 49:12 84:22 103:18,19</p> <p>refuses ^[1] 72:21</p> <p>regard ^[1] 51:25</p> <p>region-by-region ^[1] 28:9</p> <p>regional ^[2] 28:8 92:4</p> <p>regular ^[1] 84:8</p> <p>regulate ^[1] 5:4</p> <p>regulation ^[2] 17:8 49:5</p> <p>regulations ^[14] 10:11 17:19 18: 16 19:14 20:3 26:21 29:12,15 40: 21 46:17 49:13 80:7 88:17 105:12</p> <p>regulatory ^[2] 83:9 87:11</p> <p>reinstate ^[2] 86:24 105:5</p> <p>reinstating ^[1] 105:2</p> <p>reject ^[1] 82:5</p> <p>rejected ^[3] 18:2 42:15 85:9</p> <p>relation ^[1] 77:22</p> <p>RELATIONS ^[10] 1:7 4:6,13 6:1 7: 9 51:25 52:24 59:1 85:6 90:6</p> <p>relationship ^[6] 52:13,15 53:25 54:20 73:6 82:15</p> <p>relationships ^[2] 16:15,17</p> <p>relevance ^[1] 82:10</p> <p>relevant ^[8] 28:7 29:6 37:2 48:14 57:21 81:24 87:10 103:17</p> <p>relieved ^[1] 98:9</p> <p>relying ^[1] 67:8</p> <p>remainder ^[1] 87:19</p> <p>remedy ^[5] 37:11,14,15,18,19</p> <p>remotely ^[3] 75:1,8,12</p> <p>removal ^[1] 78:11</p> <p>remove ^[3] 68:18 78:6,9</p> <p>render ^[1] 92:17</p> <p>repeatedly ^[1] 43:17</p>
--	---	---	---

Official - Subject to Final Review

<p>replace ^[1] 16:9</p> <p>replicate ^[3] 62:10,13 63:20</p> <p>reply ^[2] 50:1 56:11</p> <p>represent ^[1] 5:5</p> <p>representations ^[1] 54:10</p> <p>representative ^[15] 9:16 16:5,13 39:10 67:23 69:4,7,8,12,14,17,23 70:2,16 71:1</p> <p>representatives ^[4] 5:13 46:4 98:7,10</p> <p>represents ^[1] 79:22</p> <p>repudiated ^[1] 96:13</p> <p>request ^[2] 42:15 106:2</p> <p>require ^[2] 44:1 57:6</p> <p>required ^[9] 52:21 55:16 56:24 58:13 59:22 81:9 87:15 96:14,15</p> <p>requirement ^[2] 59:2 71:16</p> <p>requires ^[6] 31:13 48:2 56:13 57:24 72:8 91:23</p> <p>requiring ^[3] 44:19 86:24 89:10</p> <p>rescinded ^[1] 94:1</p> <p>resist ^[1] 6:5</p> <p>resolve ^[1] 11:11</p> <p>resolved ^[1] 11:7</p> <p>respect ^[14] 10:13 20:15 21:8 25:10 36:2 40:14 44:10,20 52:24 62:11 86:17 101:19 104:21,23</p> <p>respectfully ^[4] 24:17 28:5 29:22 73:3</p> <p>respects ^[1] 82:19</p> <p>respond ^[1] 57:22</p> <p>Respondent ^[8] 2:6,8 3:7,10 7:18 40:10 55:13 90:23</p> <p>Respondents ^[1] 1:9</p> <p>responding ^[1] 41:17</p> <p>responds ^[1] 102:24</p> <p>response ^[5] 51:14,16 62:7 68:13 101:18</p> <p>responses ^[5] 61:22 62:24 64:13 65:24 77:7</p> <p>responsibilities ^[1] 29:11</p> <p>responsible ^[4] 54:18 82:14 87:2,3</p> <p>restore ^[1] 11:2</p> <p>results ^[1] 28:25</p> <p>reverse ^[2] 22:21 106:11</p> <p>review ^[2] 70:3 82:9</p> <p>ride ^[2] 42:25,25</p> <p>rights ^[30] 6:8 8:6 9:4,6 11:21,25 13:7 14:20 24:16 25:7 33:19,22 34:1,3,21 37:15 38:12,19 39:25 44:23 55:21 67:19,20 70:21 71:10 76:19,22 78:16 83:15 92:3</p> <p>risk ^[1] 86:13</p> <p>risks ^[1] 73:8</p> <p>ROBERTS ^[35] 4:3 28:17 29:8,18 30:5,8 39:3 40:2 41:8 43:22 47:15 49:23 51:12 55:9 73:20 74:3,10,14,24 75:7,18,21,25 76:3 80:23 81:18 86:4 89:3 90:19 93:7 94:3 101:9 102:14,17 106:13</p> <p>role ^[19] 31:25 33:8 51:1 52:1 55:18 56:2 62:18 63:9,10,11,11 64:5,23 67:12,14 74:23 78:8,9 83:13</p>	<p>roles ^[3] 62:4 63:8,8</p> <p>round-about ^[1] 42:24</p> <p>route ^[2] 7:4 22:23</p> <p>routine ^[1] 57:9</p> <p>rule ^[2] 41:11 45:17</p> <p>ruling ^[3] 36:17 50:15 91:1</p> <p>run ^[3] 73:5 83:25 104:7</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>salary ^[1] 94:25</p> <p>same ^[9] 12:12 14:1 18:2 19:19 44:1 61:10 62:11 80:3,4</p> <p>save ^[1] 17:16</p> <p>savings ^[6] 17:15,15 18:8 48:25 79:8,22</p> <p>saying ^[26] 9:9 11:7 15:19 17:4 18:23 21:3,4 27:6,23 41:23 42:3,4 44:22 50:10,21 51:16 53:14,17,23 60:8 69:10 92:10 96:18,21 105:1 106:6</p> <p>says ^[27] 5:9 7:8 8:11 17:16,17 18:12 19:13 22:3 25:9 28:15 32:8 36:17 37:6 38:2 41:5 45:18 70:20 71:9,12,15 86:6 88:6 93:24 100:3,5,9 103:13</p> <p>scenario ^[2] 63:21 94:13</p> <p>scheme ^[10] 71:23,25 79:1 83:9 85:15 91:4 92:14 95:2 97:8 98:12</p> <p>schemes ^[2] 71:3 82:18</p> <p>scope ^[1] 89:23</p> <p>Sealed ^[1] 52:4</p> <p>Sec ^[1] 48:9</p> <p>second ^[8] 13:17 39:11 48:18 59:14 62:7 77:9 83:8 104:16</p> <p>Secret ^[3] 59:19,25 60:1</p> <p>Secretary ^[11] 11:7 37:5 74:7 76:5,9,10 77:4,5,21 83:18 103:3</p> <p>section ^[15] 22:3 55:24 56:3 58:5,5 60:14 66:9,17,17 67:3 68:17 81:5 82:4 85:10 99:7</p> <p>sections ^[1] 71:14</p> <p>security ^[3] 42:17 60:3 73:8</p> <p>see ^[21] 18:23 23:4,7 24:22 30:10 32:17 36:15 44:8 63:19 64:8 65:2,5 89:6 91:23 99:9,14 100:21,21 102:10 104:10 105:22</p> <p>seeing ^[1] 59:4</p> <p>seek ^[1] 85:15</p> <p>seem ^[3] 28:17 29:19 56:10</p> <p>seems ^[4] 24:12 66:22 69:22 83:15</p> <p>seen ^[1] 70:1</p> <p>Senate ^[1] 33:12</p> <p>sense ^[22] 7:3,23 9:19 22:23 23:21 25:4,24 26:7,11 28:13 30:11,14 32:11 35:13,14 44:15 46:9 47:13 50:22,24 57:6 100:25</p> <p>separate ^[2] 33:11 63:8</p> <p>separately ^[1] 102:3</p> <p>serious ^[2] 5:15 43:10</p> <p>seriously ^[1] 106:1</p> <p>serve ^[4] 5:12 9:15 39:13 40:8</p> <p>serves ^[1] 19:11</p> <p>service ^[16] 38:10 56:5 58:25 59:19,25 60:2 63:11,16 74:21 81:6</p>	<p>85:2,2,11,12 90:12,16</p> <p>serving ^[3] 45:20 46:3 53:6</p> <p>set ^[10] 12:3 16:16 29:12 58:5 59:6,14 68:14 76:19,25 91:7</p> <p>sets ^[1] 58:24</p> <p>setting ^[5] 65:11,22 66:1 72:12,15</p> <p>settle ^[1] 24:25</p> <p>settled ^[1] 91:14</p> <p>seven ^[1] 79:10</p> <p>shall ^[1] 11:8</p> <p>shoes ^[2] 45:12 52:22</p> <p>shouldn't ^[1] 14:23</p> <p>show ^[7] 20:10,13 45:22,22 50:25 53:7 87:17</p> <p>shows ^[5] 46:5 47:10,12 103:8,9</p> <p>shy ^[1] 43:18</p> <p>side ^[4] 9:7 73:4 87:17 88:5</p> <p>sign ^[1] 5:15</p> <p>signed ^[1] 87:7</p> <p>significance ^[1] 81:21</p> <p>signs ^[1] 10:9</p> <p>similar ^[2] 61:14 82:19</p> <p>similarly ^[3] 38:25 56:10 70:6</p> <p>simple ^[1] 36:15</p> <p>simply ^[3] 5:12 45:11 106:11</p> <p>since ^[1] 12:5</p> <p>single ^[2] 73:15 102:25</p> <p>sit ^[6] 9:7,11 13:9 26:25 44:23 45:2</p> <p>sitting ^[10] 25:18,22,24 26:4,13 32:13 54:18 83:22 88:4,8</p> <p>situated ^[1] 38:25</p> <p>situation ^[9] 13:15 25:11 63:25 64:21 65:10 76:14 79:5,5 106:5</p> <p>Sixth ^[5] 4:12 86:21 87:12 88:11 106:11</p> <p>slate ^[1] 18:14</p> <p>slide ^[1] 43:14</p> <p>slightly ^[1] 33:17</p> <p>solely ^[1] 30:1</p> <p>Solicitor ^[3] 2:2,4 19:4</p> <p>solution ^[2] 33:17 79:2</p> <p>solved ^[2] 33:14,24</p> <p>somebody ^[3] 9:6 25:21 71:11</p> <p>somehow ^[3] 24:24 89:17 106:3</p> <p>someone ^[3] 52:6 58:7 70:20</p> <p>someone's ^[1] 8:14</p> <p>Sometime ^[1] 69:13</p> <p>sometimes ^[2] 98:18 99:11</p> <p>somewhat ^[1] 48:6</p> <p>somewhere ^[1] 46:7</p> <p>sorry ^[11] 10:18,20 14:2 17:3 54:17 63:18 86:1 94:18 97:20,21 98:13</p> <p>sort ^[5] 10:12 47:11 82:2 89:15,23</p> <p>sorts ^[4] 16:17 19:12 29:16 88:25</p> <p>SOTOMAYOR ^[45] 17:3,14 18:7,18,22 19:3,18 23:10 34:19 35:3,8,15,18,23 36:5,19,24 37:9,13 41:9,10 42:10 43:5 65:8,16 66:6,21 80:24,25 81:7,13,16,17 94:17,19 95:12,14,19,22 96:4,10,17,24 97:20,23</p> <p>sovereign ^[1] 61:20</p>	<p>spar ^[1] 105:9</p> <p>speaking ^[3] 10:23 11:10 39:23</p> <p>speaks ^[1] 99:15</p> <p>specific ^[1] 31:22</p> <p>specifically ^[1] 23:5</p> <p>specify ^[1] 79:4</p> <p>Spending ^[4] 60:24 62:12 63:21 65:18</p> <p>spent ^[1] 88:21</p> <p>split ^[1] 97:8</p> <p>spoken ^[1] 12:2</p> <p>standing ^[1] 12:17</p> <p>stands ^[2] 91:13 95:3</p> <p>started ^[1] 46:25</p> <p>starts ^[1] 23:15</p> <p>state ^[78] 4:14,20 5:5 6:2 7:14,20,24 8:2 9:11 16:10 17:13 20:10 24:7 25:14 26:2,4,17 27:14,14,25 28:1,1,19,21 30:2 32:9 33:8 42:12 46:19 56:22 57:8 61:2,20 62:2,17,22 63:10,15 64:15,24,25 67:5 72:18,19,19,20 73:1,2,6,13 74:18,23 75:16 76:20,20 78:8 83:16,20,22 84:18,18 85:20 89:25 90:1,5,5,10,12 91:4,15,21 93:10 94:9,16,21 103:25 104:7 106:9</p> <p>STATES ^[15] 1:1,17 24:7 30:4 50:3 61:16 64:9 65:14,18 74:11 83:13 85:14 86:1 103:24 105:25</p> <p>status ^[3] 11:3 28:20 38:23</p> <p>statute ^[49] 8:11 12:4,24 13:5 14:16 17:12 18:12 21:9,9,11,13 23:4,9 24:12,15 25:6,9,13,23 32:8,16 33:14 37:6 38:5,21 40:19 41:3,5 44:16 45:10,12 48:2,16 51:20,23 52:8,20,23 57:21,24 62:15 63:14 70:13 92:6,17,22 93:4,18 95:5</p> <p>statute's ^[1] 6:5</p> <p>statutes ^[6] 14:3 25:4 50:24 87:10 101:1 102:2</p> <p>statutory ^[9] 23:13 51:22 52:7 59:9,14,17 71:3 72:7 92:14</p> <p>step ^[3] 9:20 52:22 79:3</p> <p>steps ^[1] 12:9</p> <p>stick ^[1] 73:18</p> <p>still ^[2] 28:8 33:6</p> <p>strange ^[1] 20:9</p> <p>strengthens ^[1] 95:2</p> <p>strip ^[1] 16:10</p> <p>stronger ^[1] 69:8</p> <p>strongly ^[1] 16:2</p> <p>structure ^[1] 62:11</p> <p>structured ^[1] 13:3</p> <p>stuck ^[3] 35:12,18,19</p> <p>stuff ^[1] 10:13</p> <p>style ^[2] 7:7,11</p> <p>sub-agency ^[3] 69:3,6,9</p> <p>sub-components ^[1] 58:2</p> <p>subcomponent ^[1] 50:10</p> <p>subcomponents ^[1] 68:18</p> <p>subject ^[5] 10:2 29:15 57:5 72:23 89:19</p> <p>subjecting ^[1] 89:12</p> <p>subjective ^[1] 20:25</p>
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Official - Subject to Final Review

<p>submit ^[2] 55:17 81:10 submitted ^[2] 106:14,16 subordinate ^[1] 31:3 subparts ^[1] 58:17 sue ^[3] 35:4,7 38:14 sued ^[1] 15:20 suffer ^[1] 36:12 suggest ^[1] 56:23 suggested ^[2] 78:20 87:18 suggestion ^[2] 12:23 104:25 suggests ^[1] 100:2 sui ^[2] 25:11 79:5 suit ^[2] 7:14 27:7 super ^[1] 25:14 superseded ^[3] 19:15 36:17 49:5 supervise ^[11] 12:21 29:13 32:10 38:16 45:9 56:7 57:19 58:10 61:11 62:3 84:4 supervised ^[1] 90:4 supervises ^[2] 22:1 62:17 supervising ^[7] 24:14 25:15 29:9 67:25 74:21 90:1 94:15 supervision ^[4] 29:21 31:8 81:10 92:19 supervisor ^[1] 15:4 supervisors ^[2] 57:4 85:7 supervisory ^[1] 26:16 suppose ^[1] 60:4 supposed ^[2] 25:18,20 SUPREME ^[2] 1:1,16 surely ^[2] 21:3,3 surveyed ^[1] 80:17 survive ^[1] 80:22 suspend ^[1] 93:15 suspension ^[2] 93:23,24 system ^[7] 55:19 58:4 64:17 73:17, 18 75:4 105:4 systems ^[1] 104:8</p>	<p>2 51:22 53:24 80:3 96:2,6,15 97:17 testimony ^[1] 98:6 text ^[8] 33:5 34:8,16,18 80:21 85:10 103:11 104:17 textual ^[1] 38:2 thankfully ^[1] 47:7 themselves ^[5] 24:2 48:7 89:12, 14 91:8 theory ^[2] 93:9 103:23 there's ^[27] 6:4 9:6 24:13 25:20 37:10, 13,14,18 42:18 43:10 45:8 54:9 58:15 64:14 68:14,14 71:15,16 74:25 75:21 79:14 86:13 98:5 103:11 104:14, 17 105:9 thereby ^[1] 104:2 therefore ^[2] 51:24 56:17 They've ^[4] 23:4 34:16 41:17 43:17 thinking ^[2] 80:20 81:6 third ^[3] 68:14 82:10 83:13 THOMAS ^[15] 6:11,16,21,24 7:6,16,22 40:4,5,16 57:16 58:15 76:1,2 101:11 Thomas's ^[1] 68:13 Thompson ^[8] 17:22 36:6 48:23 79:24 80:5 91:16 97:14 98:1 thorough ^[1] 49:16 though ^[8] 12:10 14:22 24:12 84:16 87:16 97:19 100:11 103:25 threat ^[1] 78:4 threaten ^[5] 42:17 57:7 72:25 73:13 84:1 three ^[3] 20:5 63:8 75:17 throughout ^[3] 66:10 68:24 103:20 tied ^[1] 65:13 Title ^[11] 24:20,20 55:24 56:3 66:10 103:16,18,20,20 104:7,10 today ^[4] 60:24 61:2 91:13 95:3 together ^[4] 26:3 71:2 100:8 101:1 took ^[3] 83:1 87:13 97:2 tools ^[1] 30:24 top ^[2] 58:20 82:13 touching ^[1] 82:3 tour ^[1] 39:23 treat ^[1] 44:4 treated ^[4] 7:13 94:6,7,8 tribes ^[2] 51:8,10 tried ^[3] 33:9 95:23,25 true ^[6] 15:7 31:10 34:5 43:23 44:3 103:14 trust ^[1] 30:18 try ^[4] 25:3 26:6 73:11 75:9 trying ^[8] 9:25 20:21 30:10 44:15 71:2 74:25 76:14 94:20 turn ^[5] 8:15 61:20 64:9 70:8 99:6 twice ^[1] 43:15 two ^[12] 18:6 39:5,5 47:18 61:22 64:13 68:12 71:2 77:7 83:12 102:23 103:6 types ^[1] 78:19</p>	<p>U.S. ^[3] 7:9 66:19 103:5 U.S.C. ^[8] 6:15 8:4 99:7,22 100:1,5, 22,22 uh-uh ^[1] 96:5 Ultimately ^[6] 6:4 20:8 29:7 33:4 34:6 91:11 umbrage ^[1] 95:24 unable ^[1] 87:19 unclear ^[1] 93:13 uncontested ^[1] 55:20 under ^[33] 6:15,16 8:4 17:17,20 19:24 22:13 28:20,21,22,22 41:14,19 49:10 52:20 55:23 56:24 60:24 65:18 68:16 74:12 80:3,4 87:10 92:6,17,22 93:9,9,14 98:9 103:16,23 undermine ^[1] 87:24 understand ^[16] 16:14 20:8 21:20 28:18 30:6,9 38:17 44:10 51:17 64:3 71:7 84:19 89:8 95:23 96:12 98:15 understanding ^[1] 53:25 Understood ^[6] 14:25 27:9 53:18 54:20 91:13,14 unforeseen ^[1] 66:14 uninterrupted ^[3] 12:5 56:20 79:9 Union ^[12] 2:8 3:10 5:21 11:2 33:11 86:24 90:23 91:1 92:25 93:22 94:23 98:10 union-bust ^[1] 95:25 unions ^[1] 98:4 unique ^[11] 41:7 62:10,14 63:25 65:10 66:18 74:17 75:14 91:5 94:12 97:14 unit ^[7] 36:8 59:8 66:13,25 72:6,11 77:10 UNITED ^[6] 1:1,17 24:7 74:11 103:24 105:25 units ^[10] 28:8 67:4,6,9 72:3,20 76:24 84:18,19 92:4 unlawful ^[1] 86:7 unless ^[3] 19:15 45:23 49:5 unlike ^[3] 10:1 31:2 38:13 until ^[2] 23:15 71:8 unusual ^[5] 28:19 32:8 48:25 49:2 78:25 up ^[8] 12:25 13:16 16:16 33:10 47:1 50:16 60:21 99:12 upend ^[1] 56:20 uses ^[2] 21:13 22:2 using ^[4] 8:6 16:20 69:17 92:5 utilize ^[1] 65:19</p>	<p>virtually ^[1] 103:5 virtue ^[2] 71:14 89:11</p>
<p style="text-align: center;">T</p> <p>table ^[18] 9:12,24 13:9 15:23 25:19, 21 26:5,14 32:14 54:7,11 69:16 70:21 71:12,13 83:22 88:5,9 task ^[4] 13:13 20:14,18 24:4 tasks ^[1] 39:14 Tatel's ^[1] 52:3 technicality ^[2] 15:18 16:23 technician ^[6] 7:25 8:2 81:6 84:23 85:1,11 technician's ^[1] 94:2 technicians ^[58] 4:15 5:8 6:6,12, 18,20 10:8,12 11:9 13:6,20 16:7 17:9 29:2 31:1,5 39:13,24 40:22 41:6 42:14 46:11 55:20,25 56:4, 16,17,21 57:3,12,19 60:19 63:7,13, 25 64:20 67:13,18 71:4 76:21 79:12, 16 83:14 84:4 85:6 87:7 90:13, 16 91:5,9 92:2,18 95:4,6 97:7,7 98:20 104:22 technicians' ^[3] 29:10 93:17 99:3 tension ^[1] 100:21 term ^[5] 20:21 21:17 22:2 57:23 69:17 terms ^[12] 13:11 30:17 36:9,11 43:</p>	<p style="text-align: center;">U</p>	<p style="text-align: center;">V</p> <p>valid ^[1] 78:20 venerable ^[1] 41:11 version ^[1] 46:4 versus ^[1] 4:5 victory ^[1] 34:20 view ^[1] 13:13 viewed ^[1] 35:25 violate ^[1] 105:1 violated ^[1] 39:25 violating ^[3] 43:13,17 78:15 violation ^[1] 82:4</p>	<p style="text-align: center;">W</p> <p>wait ^[3] 88:6,6,6 Wallace ^[1] 49:16 wanted ^[6] 5:24 38:22 39:22 46:25 64:24 81:13 wants ^[1] 26:12 Washington ^[3] 1:12 2:5,7 way ^[36] 12:4 16:13 24:23 26:14 27:10 29:13 32:16,17 35:1 38:5,18 41:7 42:18,22 44:8 46:6,9 47:6 49:12 63:5 67:14,15,16,17 73:4,10 79:11 83:25 87:18,23 88:15 100:25 103:9,11 104:14 105:11 weaker ^[1] 38:12 wear ^[1] 75:17 welcome ^[2] 6:10 57:15 whatever ^[7] 21:4 37:4 39:18 45:15 61:18 64:10,11 whatnot ^[1] 70:16 Whereupon ^[1] 106:15 whether ^[11] 8:8 24:13 30:10 35:13 36:14 43:18 50:19 52:5 64:10 70:14 91:19 whichever ^[1] 88:15 who's ^[4] 9:20 25:17 67:24 82:14 whole ^[2] 14:4 25:4 wholly ^[1] 46:12 whosever ^[1] 74:7 wield ^[1] 16:1 wielding ^[1] 94:14 wields ^[1] 5:20 will ^[2] 20:14 46:11 willing ^[1] 37:10 win ^[1] 45:22 window ^[1] 104:3 wins ^[1] 49:14 wiped ^[1] 18:14 wish ^[4] 10:14 28:12 104:22,23 withheld ^[1] 95:10 withhold ^[7] 27:3 46:13,14 72:25 73:13 105:6 106:8 withholding ^[5] 11:3 57:7 86:25 87:2,6 withholds ^[2] 10:10 27:2 within ^[5] 24:21 46:12 51:2 58:2 85:11 without ^[6] 11:1 12:6 21:5 30:21 58:12 83:21 wondering ^[2] 45:7 100:23 word ^[6] 13:21 14:5 20:19 29:24 32:3 35:25 words ^[5] 11:10 23:7 28:24 49:8 62:8 work ^[12] 10:1 18:11 20:7 26:22 28:23 29:16 30:19 46:18 51:8,20 79:18 92:13 worked ^[2] 73:18 105:17 workers ^[2] 38:11,23 working ^[1] 92:19 works ^[4] 19:8 53:11 95:7 98:12 world ^[2] 13:8 22:19</p>

worried ^[1] 89:7
worry ^[1] 66:11
worth ^[1] 103:4
writ ^[1] 89:15
write ^[1] 32:16
wrote ^[1] 44:19

Y

year ^[1] 84:21
years ^[8] 5:17 56:20 72:24 73:19
79:9,13,20 88:21
yourself ^[1] 27:22